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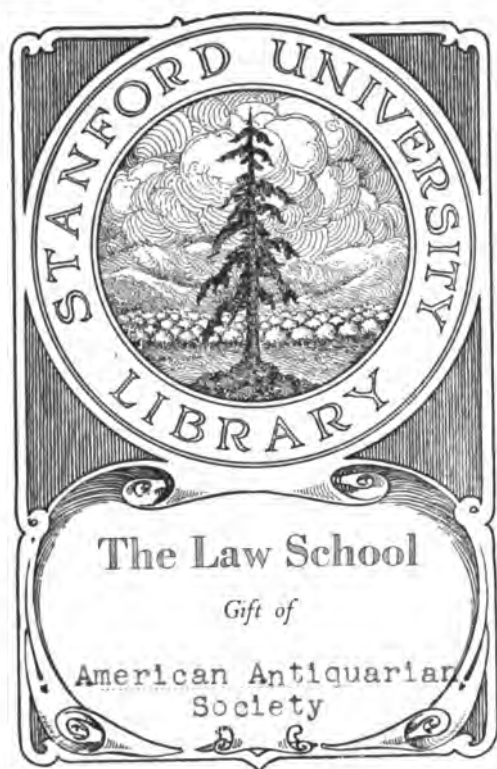
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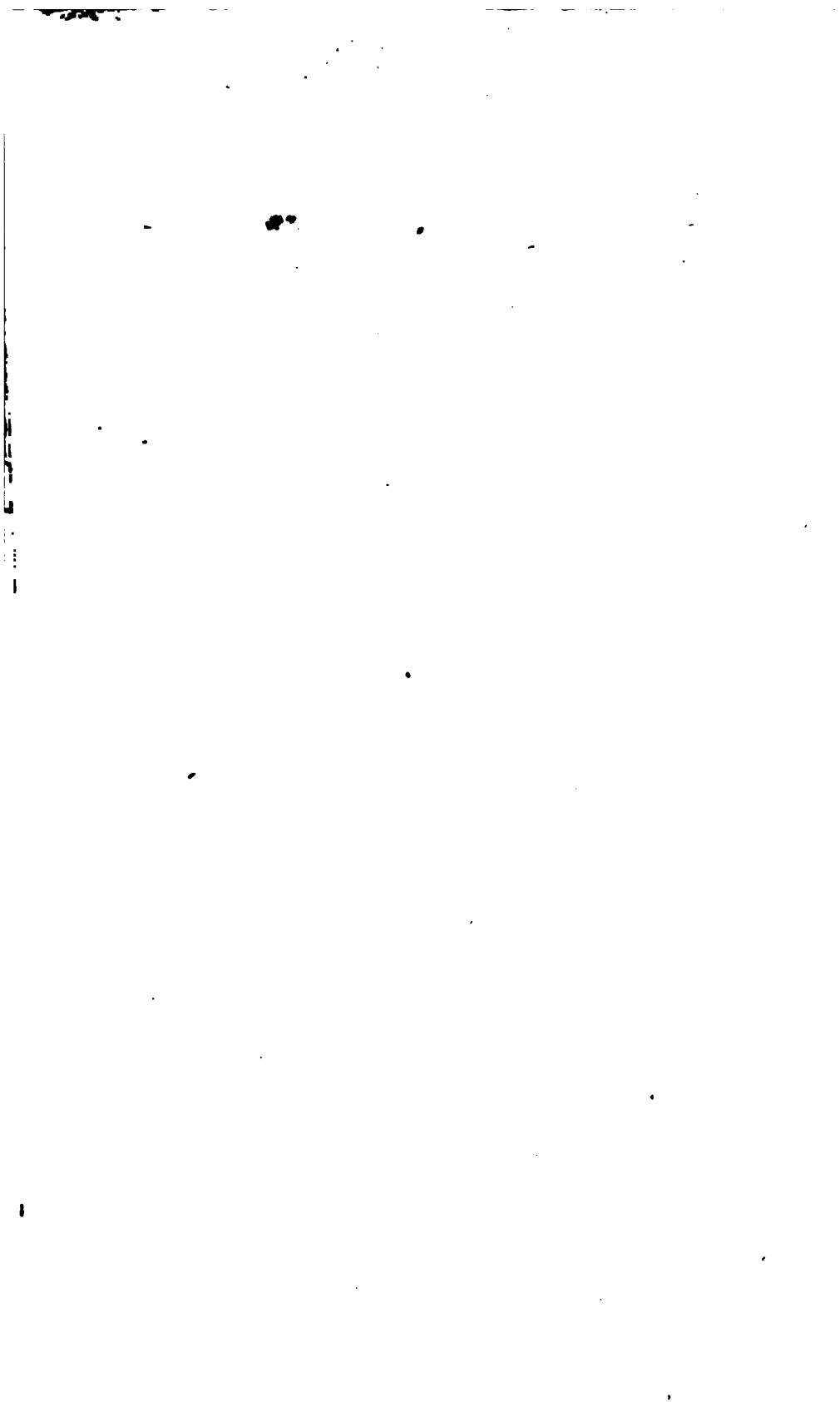
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FORMS OF PRACTICE;
OR
AMERICAN PRECEDENTS
IN
PERSONAL AND REAL ACTIONS,

INTERSPERSED WITH
ANNOTATIONS.

BY BENJAMIN L. OLIVER.

THIRD EDITION.

"Pittacus, being asked by Cræsus, what was the most excellent government, answered, *"the government of the checkered or parti-colored table;"* meaning a GOVERNMENT OF LAWS; because anciently the laws were inscribed on wooden tablets of various colors."—*Conradi Lycosthenis apoph.*

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PREFACE.

THE work here submitted to the profession, contains a selection of precedents of declarations in all the most usual forms of action, which have generally been adopted in practice in the New England states. A large part of these forms have already appeared before the public, in the first edition of a work entitled *AMERICAN PRECEDENTS OF DECLARATIONS*, and have received the sanction and approbation of the sages of the law. The rest have been selected from the best authorities, and are designed to supply those forms which are wanting in that work.

The *American Precedents of Declarations* is a publication so well known, that any remarks in relation to its merits would seem superfluous. Few, however, are acquainted with its origin. It was compiled by Benoni Perham, Esq. now deceased, then a student at law, and near the termination of his studies in the office of the late Joseph Perkins, Esq. assisted by a gentleman now of high official standing, but at that time just commencing the practice of his profession. By this gentleman a large part of the forms were collected and prepared, and the whole work was carefully examined and revised gratuitously, for the benefit of Mr. Perham. The precedents, collected in that work, were almost wholly transcribed from manuscript forms, which, in the language of the preface to the first edition, "have been preserved with veneration, and collected with fidelity by the first ornaments of the bench and forum in our own and adjoining states." The Introduction to that work is in every respect worthy of the hand of its author, and probably at first was intended as a portion of the large and valuable *Abridgment and Digest of American Law*, with which he has lately favored the profession. It was thought best, however, to omit it in the present work, and, to substitute another, which, however inferior in every other respect, might be of a more practical nature.

The following collection at first was merely intended as another edition of the *American Precedents*, but, considering the number of editions of that work, and the different editors who have been con-

cerned in them ; and entertaining a wish to prevent a confusion of works, titles, editions and editors, the present editor thought best to bestow a new title on this work, to which its new arrangement of materials, as well as the large quantity of additional matter contained in it, which has doubled its original size, well entitles it.

The additions to this work consist, 1. Of a number of valuable forms, selected, partly from manuscripts prepared under the direction of Judge Story, partly from approved draughts of distinguished pleaders found on the records ; the rest from the best English authorities : 2. Of notes marked (*MSS.*) which are taken from the same manuscripts : 3. Of a new general Introduction to the whole work : 4. Of a concise Introduction to each form of action ; and 5. Of annotations introduced occasionally throughout the work without any distinguishing mark. For the three last numbers, *viz.* the general Introduction to the whole work, the introduction to each form of action, and the annotations, and a few original draughts of comparatively small importance, amounting in the whole to about 150 pages closely printed, the present editor is alone responsible.

In the general Introduction, as well as in the introductory remarks to each form of action, and in the annotations throughout the whole, which he has generally inserted in immediate connexion with the forms to which they relate, the present editor's aim has been to make the work as useful as possible. For this purpose he has often omitted such matters as every professional gentleman is necessarily presumed to be acquainted with, and with which much space is not infrequently occupied in works of practice. By adopting this course, he thus gains room for other things less obvious, and, if not of such general application, at least not so commonly known, nor so readily obtained.

It would have been his utmost ambition to make the work a manual of safe practice, but this object is attainable only in a moderate degree. For the passing of general laws with a view merely to particular occasions, purposes, and persons, without duly considering what the operation may be on the public at large, or how far such new laws may trench upon or deform the whole system of the common or previous law ; the desire, which many judges on their first appointment seem to have to break through the trammels of former decisions, by which in their practice at the bar they had found themselves shackled, and perhaps considered their clients aggrieved ; the wavering and uncertainty, which occasionally seems to affect the most able and discerning judges in determining, from a comparison of the ill effects in either case, whether at once to

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override an inconvenient decision, or, by suffering a long continued error to be matured into right, to yield to its authority, and thus give their own sanction to its injustice or impolicy; the influx of false opinions, from which the law is not exempt any more than religion or philosophy; the progress of society, whether to or from its zenith, occasioning new relations of individual or political intercourse, and consequently requiring new regulations; in an especial manner in our own state, the gradual introduction of equity into our municipal law, in portions not well defined and incoherent, by laws enacted from time to time, and perhaps suggested by particular emergencies, so that the whole system has become like the coat of the patriarch's son, and if regularity had not been wanting, might well be entitled to the denomination of the law and Court of Exchequer, has for a long time kept, and probable will always to a certain extent, keep the law in a state of continual flux and change.

It is from this uncertainty and instability of the law, that the difficulty arises, which is so often seen, of ascertaining, *a priori*, the result of any law case, where able counsel are employed, and which is sometimes so great, that little more than mere conjecture can be hazarded in relation to it; and hence, too, there can be no decision of any question, which will probably arise hereafter among men eminent in the profession, but which may be justified by authority, sanctioned by precedent, or at least grounded on analogy.

From these evils, the imperfection of our legislative system, however admirable in some respects, affords no hopes of deliverance; and a mitigation of them can only be hoped from the wisdom and prudence of those, who preside in the courts. And while the benches of our Supreme Judicial Court, and Court of Common Pleas are filled, as now, with men of the highest respectability for religion, learning, and probity, reliance may safely be placed on them for that purpose, and justice in the abstract, without doubt, will be administered to all, without distinction, as far as the compliance with indispensable forms will permit. But if hereafter, by injudicious appointments, men of a different character should obtain possession of these honorable stations, it will be found, that a test is wanting of the proper discharge of judicial duty, and that official delinquency is perfectly consistent with the absence of proof of palpable corruption, and that a most unjust decision may be sustained and justified, by plausible deductions of reason, from expediency, analogy and precedent.

But in the present work there are other sources of imperfection

of a personal nature, for which apology would be useless and ineffectual, since, in the words of the wise man, "what is wanting cannot be numbered;" and the editor would have made it more useful if he could. —

The author thinks he cannot conclude this preface better than by reciting the following case, which, as relating to the official conduct of one of the greatest judges that ever sat on the King's Bench, cannot fail to give rise, in the mind of the discerning reader, to many interesting reflections.

In the month of November, 1768, a woman having appeared before two of his majesty's justices of the peace, to swear a child against the secretary to Count Bruhl, the Saxon minister, the Count interfered, and the justices were afraid to proceed. The woman applied to Sir Fletcher Norton, who advised that a motion should be made in the Court of King's Bench, for a peremptory mandamus to the justices to proceed in that *filiation*. The motion was accordingly made by Mr. Mansfield.

The Lord Chief Justice Mansfield received it with marks of anger and surprise; he said he did not understand what was meant by such collusive motions, unless it was to draw from that court an opinion upon the privileges of foreign ministers, which they had no right to meddle with; that the motion was absolutely improper; that he wondered who advised it, and that he certainly should not grant the mandamus.

Sir Fletcher Norton then got up, and said that the party was his client; that his majesty's subjects, when injured, had a right to redress somewhere or other; and that he knew of no place where such redress could be legally applied for or obtained, but in the Court of King's Bench; that therefore he had advised the motion.

Lord Mansfield, upon this, began to flourish, in his usual style, upon the sacred privileges of ambassadors, the law of nations, &c. &c., repeated something about collusive motions, and took notice that the application for redress ought regularly to have been made to Count Bruhl, or to his majesty's attorney general.

Mr. Justice Aston said, deliberately, that he agreed entirely with the Lord Chief Justice, and that the motion ought not to be granted.

Sir Fletcher Norton then said, that after he had declared *himself* the adviser of the motion, he did not expect to have heard it again called *collusive*; that he despised and abhorred all ideas of *collusion* as much as any man in that court; that it was the first time, and he hoped it would be the last, that he should hear the Court of King's Bench refer an injured subject of England to a *foreign minister* or to an *attorney general* for redress; that the laws of this

country had not left his majesty's subjects, complaining of injury, without a legal and certain protection ; that their claim was a claim of *right*, upon which the Court of King's Bench had full authority to inquire, and *must* determine ; that if his clients were injured, he should always bring them to that court for redress, let who would have committed the injury, and he would take care that that court *should* do them justice ; that his motion was proper and *should not* be withdrawn.

Judge Yates then said, that the reasons offered by Sir Fletcher Norton had clearly convinced him ; that he had not the least doubt of the authority of the court to protect his majesty's subjects ; and that, for his part, he should never refer them either to a foreign minister, or to an officer of the crown ; that he thought the motion perfectly regular, and that it ought to be granted.

Judge Aston then began to recant. He said, that he was always glad to be convinced of a mistake, and happy in having an early opportunity of acknowledging it ; that from what his brother Yates and Sir Fletcher Norton had said, he saw clearly that his first opinion had been erroneous, and that he agreed the motion ought to be granted.

Lord Mansfield then, in great confusion, said that he should take time to consider of it. To this Sir Fletcher Norton replied, that as two of the three judges were of the same opinion, the motion *must* be granted ; but that, for his part, if his lordship wanted any time to consider, whether, when a subject applied to the Court of King's Bench for redress, he was or was not to be referred to a foreign minister or to an attorney general, he had no objection to allowing him all the time he wanted.

THE compiler avails himself of the opportunity, afforded by a call for another edition of this work, to improve it by the addition of new and valuable matter, and the retrenchment of what might best be spared. In this way, he hopes to increase its utility, without much increasing its size. For this purpose, the whole work has been carefully revised, the general Introduction written over again, and a great number of points of practice, decided since the last edition, interwoven among the forms. The Precedents have been left without alteration. To attempt to alter them, to make them conform to the modifications introduced by the Revised Stat-

utes, would weaken their authority, as by so doing, they would lose the sanction of the names of the eminent counsel by whom they were originally draughted. The annotations, however, give notice of these modifications, and suggest the alterations, which the young practitioner may find it expedient to adopt. These changes are not so numerous, as might reasonably have been apprehended. Because the Revised Statutes, though occasionally introducing important changes in the law, for the most part were intended merely to simplify the law, by collecting, arranging, condensing and reducing to a systematic code, the various provisions and enactments, which otherwise, are only to be found dispersed, here and there, through the statutes of many previous years. Besides, it cannot be dissembled, that, judging from the past, it was impossible to have any implicit confidence, that those changes in the law, however specious they might be in appearance, would be of any long continuance.

The advantage to be derived from a revision of the statutes in the manner referred to, is, that they are reduced within a reasonable compass, and thus brought within the reach of the general reader. But great benefits are often accompanied with some serious disadvantages, and this case seems to furnish no exception to this general remark. Before the Revised Statutes, the law, consisting of the statutes then in force, and the decisions grounded on them, constituted one great and tolerably harmonious system, which, though too large to be within the grasp of any other than professional students, afforded to a certain limited extent, to parties contending in law, sufficient rules, by which they might generally arrive at a probable conjecture, as to the extent of their legal rights, and furnish their legal advisers grounds, on which to anticipate the result of any suit, which they might be compelled to institute, to settle or assert those rights. But the Revised Statutes, having repealed all those statutes, on which the learned opinions of the courts were grounded, have absolutely shaken to the foundation the whole system of law previously existing. It is true, that, in most cases, the Legislature merely intended to condense, arrange, and re-enact those statutes, which they repealed; and for the sake of the argument, it may be admitted, that all the modifications introduced by the Revised Code, are, in the highest degree politic and salutary; yet, in cases where it may be considered somewhat doubtful, whether the Legislature intended to alter the law or not, as well as in cases where it seems tolerably clear they did not intend any alteration, by altering the phraseology of the repealed statutes, which they intended substantially to re-enact, they have weakened, if not destroyed the

authority of many cases under those repealed statutes, which have employed the abilities and learning of the ablest judges on the bench of the S. J. Court for the last forty years, to determine. It is no satisfactory answer, that, by re-enacting the provisions of the repealed statutes, in other phraseology, the Legislature have left the law, in those cases, as it was before, and consequently intended, that the cases under the former statutes, should retain the same authority, as before the repeal. Such a proposition may afford ground for argument, but until it is sanctioned by a judicial decision, seems entitled to no higher respect. In every single case, of a re-enactment of the provisions of a repealed statute, where the slightest alteration is made either in the phraseology, or the context, before any respect can be paid to the decisions made under the repealed statute, for the purpose of showing by analogy, the construction, that ought to be given to the Revised Statutes, on the same subjects, the first question must always be to settle whether the Legislature intended to alter the law; if so, to what extent? if they did not intend to alter the law, why did they change the phraseology? Did they mean to leave the *express* provisions of the law, precisely as they were expressed in the former law, but by altering the phraseology, did they or did they not mean to negative the *construction*, which the court had given in some particular cases, grounded merely on the peculiarity of the phraseology of the former statutes, and which construction the court had regarded as a necessary implication? Until this doubt is solved, and it seems a reasonable one, and one which may arise in many cases, an air of uncertainty is thrown over the law; the authority of adjudged cases is greatly weakened; and the labor of the advocate and the counselor is doubled, to settle in his own mind, what the law is, in cases not falling within the plain and express language of the Revised Statutes. The stately and venerable fabric of the law, which has been so many years in building, is thus shaken to its foundation, as if by an earthquake; and though externally it may retain its former beauty and magnificence, yet we have lost our confidence in its durability and strength. We know not, whether it may not have flaws in it, and instead of being the mansion of truth and certainty, we cannot tell whether it may not, from time to time, fall piecemeal and destroy the rights of those unhappy persons, who are compelled to rely upon it for the protection and enforcement of them.

Further, the cases, which were decided under some of the provisions of the repealed statutes, were so decided after solemn argu-

ment, in important trials before learned and prudent judges, whose deliberate opinions are carefully and faithfully reported. The grounds of those decisions therefore appear at length, and the attentive reader may readily discern, how far each decision may securely be relied upon, as a guide, in cases more or less analogous, arising under the Revised Statutes. But, when by the operation of these Revised Statutes, the provision of the repealed statutes, on which any such solemn decision was grounded, is taken away, though intended to be re-enacted in substance, those decisions become almost a mere *tubula rasa*, and the Courts must go through the same toils and lucubrations again, to ascertain, if their former decisions can be suffered to stand without destroying the harmony and symmetry of the new system of law, intended to be established under the Revised Statutes.

But, it may be replied, that the Commissioners have annexed to the alterations, which they recommended to be made, in those statutes, which they have revised, a series of annotations, by way of running commentary, in which the reason of the alterations, which they recommend, and consequently the limits to which they may fairly be extended, by construction, manifestly appear, and that the Legislature, by the adoption of those alterations, have sanctioned the policy upon which they are founded, as well as the construction which the commissioners intended should be given to the clauses in which such alterations are contained. But, as the Legislature did not always agree in opinion with the commissioners, as obviously appears, because they did not adopt all the alterations which the commissioners recommended, it is possible, they may have adopted some few of those alterations, with views in some measure different from those of the commissioners; the reason of those regulations, introduced originally by the Revised Statutes, cannot therefore always be known with such certainty, as to make the commentary of the commissioners of equal authority with cases adjudged under those statutes by the Supreme Judicial Court, and reported by able reporters. But, besides, the commentary of the commissioners does not appear in the ordinary edition of the Revised Statutes, neither, if it did, is it within the power of the Legislature itself, to give the sanction of authority to those annotations, unless by embodying them in the positive enactments of the statutes.

Thus it is apparent, that the repeal of those statutes, on which many of the decisions of the last forty years are based, in some measure unsettles those decisions, and weakens the reliance which otherwise might have been safely placed on the reports of those cases. Its operation may be assimilated to that of opening a set-

ted account in Probate or Chancery, where every thing is again thrown open to exception, and where nothing can be finally settled but by a new decree, after re-hearing. It follows, that these learned reports, in a certain degree, lose their authority and become mere grounds of argument. Yet the beautiful system, as remodeled in the Revised Statutes, and arranged in a style of elegance and logical precision, worthy of the learned and accomplished commissioners, having its true construction gradually settled by the judges, who now grace our highest judicial tribunals, would, after the lapse of a few years, have resumed its former extensive and well ascertained application to every transaction, arising in the intercourse among the members of society; but that just apprehensions may well be entertained, that before these years will have elapsed, one half at least, of this beautiful edifice may be torn down, and its place supplied by imaginary improvements of a newer fashion, but equally out of harmony with the principles on which the architecture of the original building was established, and ill adapted to the true wants of society and the exigencies of the times.

Let the careful reader look at the act of Amendment to the Revised Statutes of Massachusetts, passed within four months after the Revised Statutes were adopted by the Legislature, and observe the excessively awkward mode, in which the amendments, whatever their policy may be, are introduced, and in which fifteen different chapters of the Revised Statutes are altered or amended; let him look at various chapters of the Revised Statutes in relation to pleadings in various actions and under various circumstances, and then turn to the act of 1836, enacted a few months afterwards, by which special pleading is wholly abolished; let him look at the chapter of the Revised Statutes regulating the commissions of executors and administrators, and then look at the act of the Legislature repealing that act a short time after; let him look at the fluctuating policy of the Legislature with regard to the License Law, the laws relating to insolvent debtors, &c., &c., &c.

These incessant changes, it is believed, are principally owing to the House of Representatives, the *mater familias* of the commonwealth, which, though graced in the highest degree with the feminine accomplishments of eloquence, activity and versatility, can hardly be expected to be found equally adorned with the masculine virtues, wisdom, firmness, stability or consistency; and though the Senate, the *pater familias*, may naturally be supposed to possess these latter qualifications in a high degree, yet, in accordance with what is reported frequently to happen in New England, the stronger judgment, gives the reins too much to the weaker; and the benev-

olent governor, the *avus*, though intended by the constitution of the commonwealth to be a counterpoise to the influence of both houses, at least within certain prescribed limits, rarely possessing sufficient moral or political courage to oppose the inclination of the two houses, it is apprehended too often approves of acts of a bare majority of both houses, without any better reason, than because they are so ; thus compromising his dignity, and reducing his own legitimate authority to a zero. *Hinc illæ lachrymæ.*

But, as stability in the laws is of the next greatest consequence to their wisdom and sound policy, it would be better for the Governor never to consent to alter any law, established by a previous Legislature, unless the repeal should be sanctioned by two thirds of both houses. The people might then have a better founded confidence in the continuance of those laws, (once called PERPETUAL, but with no better reason than because they were *perpetually* changing) which are to regulate their dealings with each other, and no longer be apprehensive, that laws of the greatest importance on account of their influence on society, will be altered even before they can be well known and understood, and before the various dealings and operations, commenced under them can be completed. To illustrate : — Let it be supposed for a moment, an important bill is proposed, and after due deliberation, is adopted by a small majority of both houses of the Legislature, and is approved by the Governor. Suppose, further, that the minority in each house, on this subject, being very powerful and having great influence with the people throughout the commonwealth, succeed in their attempts to procure the return of representatives and senators, who are selected for the express purpose of endeavoring to procure the repeal of the law in question. Suppose that a bill for the repeal of the law, is passed by a small majority of both houses, and is then laid before the Governor for his approbation ; may he not well refuse to approve the bill on account of the following objections ; and is there any thing in those objections, that ought to make him reluctant to have them entered on the records of the General Court. e. g. : —

“ The views of the Governor, in relation to the expediency of the law, the repeal of which is the object of the act laid before him by the Legislature for his approbation, not being materially changed by the highly interesting debates in the Senate and House of Representatives, he is constrained to withhold his approbation of the act for the repeal of that law. When the law referred to, at a former session of the Legislature, was offered to him for his approbation, he did not consider it as introducing a change of policy of

sufficient importance to induce him to make any objection to its enactment. He was therefore willing to give his approbation to the declared will of the majority of both houses of the Legislature. But, the act having been passed, and its policy being thus recognized, the opinions and wishes of the members of a new Legislature, even although some of the members should be chosen for the express purpose of endeavoring to procure a repeal of the act under consideration, furnish in his mind, no sufficient counterpoise to the weight of opinion of the former Legislature, to turn the scale against the law. For, should the Governor approve of the repeal of the law, merely because the new members of the Legislature are opposed to its continuance, those of the members, who favor the continuance of the law, by using more strenuous efforts, at the next election, may prevail on the people to select members, who shall be in favor of its re-enactment, in which case, a regard for consistency will compel him again to approve of its re-enactment. But, from such wavering and vacillation there will be great danger, not only that the Governor may lose all claim to personal respect from the people, as having no settled principles or opinions of his own, but the office of Governor will lose its constitutional weight and importance, the people be kept in a state of continual fermentation, through the organization of interested factions, and the legislation of the State come to be lightly esteemed among those of its neighbors, who possess more wisdom and stability.

“Changing the laws, therefore, being of itself an evil, he is unwilling to approve of any act, which tends to introduce any important alteration in the general policy of the State, the expediency of which alteration, shall not have received the sanction of two thirds of the members of both houses ; because, in his mind, the benefit of such proposed alteration will not countervail the mistakes which may arise among the people, while the law is new, the want of public confidence, resulting from this source, the disparaging opinion of mutability and instability, “ which the people will be apt to form of the General Court, and the loss of esteem and respect among the neighboring states from the same cause.”

It is to the wisdom and steadiness of our Governors, for the time being, therefore, that we must look, for a remedy for the evil just alluded to, *i. e.* instability in our legislation ; and their sanction, like a balance wheel to regulate the whole machine of state, was required by the constitution to give efficacy to our laws. Should that balance wheel, to use a technical but barbarous term of machinists, be found *to wobble*, with the motion of the other wheels, or be too light or too weak to afford a sufficient check, to their

rapidity or unsteadiness, the motion of the whole machine must be irregular and desultory, and the machine itself stop or run down.

But, perhaps, the Governor may fear, that he shall become unpopular, if he should withhold his approbation from the acts of the Legislature. He may have some ill defined apprehension, that he may be thought to set himself against the will of the people, if he opposes the declared will of a majority of both houses of the General Court. But, it is a reflection on the good sense of the people, to suppose there can be any rational ground for such an apprehension. Whenever the public good, for whatever reason, seems to him, to require him to withhold his approbation from an act of the Legislature, it is his duty to withhold it. This power was given for the express purpose of being a check on the proceedings of the Senate and House of Representatives. If it were otherwise, his office would become a mere pageant, and he himself would be of no more real utility in the government than the golden image of Nebuchadnezzar. But, in fact, the members of the Legislature have no juster pretensions, to consider themselves as the organs of the people to express their will, than the Governor has, and his acts are as really, the acts of the people, as theirs can justly pretend to be. They are chosen by the people to legislate, and he is elected by the people, to check their legislation. The mistaken opinions, which appear to be entertained on this subject, it is supposed, result from a misapplication of the analogy existing between our government and that of Great Britain. But, it should be observed, in England, the King is an hereditary monarch, with limited powers, it is true, but the people can neither remove him nor change the succession to the throne without a political revolution. In this Commonwealth, the Governor is a chief magistrate, chosen annually by the people, for his reputation, as a man of knowledge, wisdom, experience and ability. The Governor, therefore, being chosen by the people, is a popular officer, and the people confide in his integrity to exert his abilities, within the constitutional limits, for their general welfare. Within those constitutional limits, his will is their will.

In England, the House of Lords consists of an hereditary nobility, wholly irremovable by any civil action of the people; they are therefore constitutionally independent of the people. But, in this Commonwealth, the members of the Senate are chosen annually by the people; they are therefore servants dependent upon the will of the people. The analogy between the House of Lords in England, and the Senate in this Country, in this respect, is therefore very slight.

In England, the members of the House of Commons are chosen by the people; they are therefore, in *England*, the representatives of the people in a peculiar manner. The King and the Peers not being elected by the English people, have not the same title to consider themselves in this light. But, in this Commonwealth, the members of the house of Representatives, though justly considering themselves, as holding the same relation to *the Legislature*, that the House of Commons do to the Parliament in England, yet have not the slightest reason to consider themselves as *peculiarly* representing the people, unless, being younger, more numerous, and less select, and possessing less knowledge, less experience, less wisdom, less consistency and less stability, can justly authorize them to claim an exclusive title to so honorable a distinction. For the Senate, and the Governor, are equally chosen by the people, and in the selection of candidates to fill those important offices, great regard is had to dignity of character, experience, prudence, knowledge and real ability.

But if the number of the House of Representatives were reduced to double that of the Senate; if there were an intermediate public officer between the people and their Legislators; if it were an established rule, that no bill to repeal a law, or to make a change in the policy of the commonwealth, shall be acted upon decisively, at the session of the Legislature at which it is presented; if a moderate tax of ten or fifteen dollars, were required to be paid into the treasury of the commonwealth, before the reception of any application to the Legislature, for the passage of any act which is not of a public nature; if a tax of one per cent. on the amount of property, which every or any corporation shall hereafter apply for leave to hold, were to be laid, upon granting that leave; the good citizens of this Commonwealth might entertain a reasonable hope, that the turbulent influence of petty local factions would cease; the people no longer be overburthened with unnecessary taxes, the sessions of the Legislature being reduced in continuance, one half or two thirds; an end be put to hair-brained and ruinous speculations, and consequently many opportunities for the practice of fraud be cut off; *speculations*, where baits are laid by the reckless and penniless adventurer, for the avarice or simplicity of those who have something to lose, and where consequently success may possibly enrich the adventurer, but where the failure must necessarily impoverish the confiding lender; the insolvent debtor no longer live at his ease on concealed property, while the creditor suffers privations for want of his just due; the swarm of useless stock companies (empty bubbles) be diminished so that insolent and salaried drones may no longer be

paid for mismanaging and wasting the capital of simple and unsuspecting stock holders, especially widows and orphans, and persons under guardianship; the laws acquire a reasonable stability, so as to be known and observed; and this enlightened but too indulgent government be respected as she ought to be, by those, who may then contemplate the intelligence, good order, integrity and prosperity of her citizens.

But may this be hoped for? Can the *animal*, self indulgence, give way to the *intellectual being*, self restraint; can men relinquish the gratification of their passions, whether avarice, ambition, vanity, &c., &c., in compliance with the dictates of their true interests? It may be insisted, but can hardly be expected. *Nam impossibile est, ut lapis sursum projectus, deserat naturam descendendi terram versus, neque, si millesies millies eum sursum projiciendo, aliter velis assuefacere, illud efficere poteris.*

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INTRODUCTION.

CHAPTER I.

OF THE NATURE AND DIVISION OF ACTIONS.

As Governments were established among men, in order that the citizens or subjects might be protected in the enjoyment of all their reserved rights and liberties, it would seem to argue great inconsistency, if any individual, in any well regulated society, might be injured without having some tribunal established to which he might resort, with the full assurance of obtaining redress or reparation. Courts of Justice were therefore established, and immediately adopted the maxim, that there was no wrong without a remedy.

Yet, it soon became apparent, that, from the imperfection of human nature, cases might frequently arise, where great damage and loss might arise to an individual from the act of another, for which no redress could be obtained, without doing great injustice or violating the dictates of sound policy. Where a case of this kind occurred, it was called a damage without injury, and the Latin phrase, *damnum absque injuria* became proverbial.

If a judge of record, in the exercise of his judicial functions, without express malice, should make an unjust decision or decree, though to the ruin of one of the parties, yet the judge would not be liable to any action for it. *See Garnett v. Ferrand*, 6 Barn. & Cr. 611.

And for the same reason, no action will lie against a magistrate, for any thing done under a conviction, unless there is an entire want of jurisdiction. 7 Barn. & Cr. 394.

So, where any officer is entrusted by law with a judicial discretion, it seems, he is not liable to any action for any imprudent use of it. And therefore, it was decided, that a coroner, holding an inquest, may lawfully exclude persons, at his discretion, without being liable to an action therefor. 6 Barn. & Cr. 611.

To afford an injured party a convenient and adequate remedy, various forms of action have been established, adapted to the nature of the wrongs which have been offered to him, and for which he seeks redress. These established forms ought to be observed and kept distinct, and their boundaries preserved, and, if it appears on the pleadings that actions of a different nature have been mixed, it will afford sufficient ground for arresting judgment. *See* 2 Hen. Bl. 243; 1 Stra. 635. And it seems, the Courts will not be bound by any agreement of the parties, to disregard the form of action, and give judgment on the merits. *See Ker v. Osborne*, 9 East, 377. *See also* 15 East, 309.

An action of Assumpsit, therefore, cannot with propriety be brought on a covenant in an instrument under seal; nor can an action of covenant be brought on a promise in writing without seal, though a covenant is nothing more than a promise contained in a sealed instrument, and a promise is a covenant by an unsealed writing or by mere words without writing.

But any number of claims for redress, if belonging to the same form of action, may be joined in one action, provided each of the wrongs are plainly set forth in separate *narrations*, or counts, as they are called, in the complainant's declaration or statement of the wrongs of which he complains.

And in such case, if the plaintiff or complainant should bring an action on several causes of action, and should omit to introduce evidence in relation to one of them, it is said, he is not precluded by the judgment, which may be rendered in that action, from bringing another suit to obtain redress for the cause of action for which he thus omitted to introduce evidence. But, it must be made *clearly to appear*, that there was no inquiry into it in the former action, or he cannot recover. 6 T. Rep. 607.

SEC. I. — *Civil Actions are either real, personal, or mixed.*

1. Real actions are either Writs of Right, strictly so called, brought by a tenant in fee simple, to recover his inheritance; Writs of Right of Dower, brought by a woman to recover Dower in the lands of her deceased husband, when she has had only a part of it; or Writs of Right *de rationabili parte*, brought by one parcener, &c. in fee, against the other who enters into the whole; or, 2. Writs in the nature of Writs of Right, as *Quo jure*, brought by tenant in fee simple, against him who claims common in the land; Dower,

unde nihil habet, brought for dower; *Quod permittat*, which lies to have common, to remove a nuisance, &c.; Formedon, either *in descender*, *remainder*, or *reverter*; or, 3. Writs of Entry, upon disseizin, intrusion, alienation, and in the *quibus*, *per*, *per and cui*, and *post*; or, 4. Writs ancestral possessory; as *Mort d'ancestor*, upon abatement made by a stranger after the death of an immediate ancestor; *Ayel*, upon abatement after the death of a grandfather; *Besayel*, upon abatement after the death of a great-grandfather; and *Cosinage*, upon abatement after the death of any collateral cousin; *Nuper Obiit*, which lies when one parcener after the death of an ancestor enters and ousts the other, &c. &c. These were the ancient common law remedies, but in modern times we seldom hear of any other real actions than Writs of Entry, Writs of Right, Writs of Formedon, and Writs of Right of Dower, or Dower *unde nihil habet*; and instead of a *Quod permittat*, a personal action on the case for a disturbance, or for a nuisance, would probably be the proper substitute in modern practice.

2. Personal actions are such as relate to a man's person or possessions, or whereby he claims a duty or damages in lieu of it. They are accordingly grounded either on contracts, or on injuries, or wrongs, technically called *torts*, done with or without force. Actions grounded on contracts, are account, debt, assumpsit, covenant, detinue.

Actions grounded on wrongs with force, are trespass, for assault and battery, wounding and maiming, &c.; or for breaking and entering one's house, or carrying away one's goods, &c. &c.

Actions grounded on wrongs done without force, are case for slander, or libel; trover for goods unlawfully detained, for which, under the Revised Statutes, replevin may now be brought, &c. &c.

Mixed actions are those wherein a freehold is recovered, together with damages; as, actions of ejectment, under the English practice, which, though adopted in the New York practice, has never been introduced into this Commonwealth, though it has been attempted.

The action of waste is expressly recognized in this Commonwealth, in ch. 60 and 105 of the Revised Statutes; and by it, the place wasted, with damages, may be recovered of the tenant in dower, by the courtesy, or for life, or for years, by the person having the next immediate estate of inheritance. An action of the case, in nature of an action of waste, may also be brought in such case, in which damages only are recoverable, and not the place.

wasted. This action on the case in the nature of waste, may be brought not only by the person having the next immediate estate of inheritance, but by the person having a remainder in fee or in tail, after an intervening estate for life, and also by one who has a remainder or reversion for life or for years only, and each shall recover such damages as it shall appear that he has suffered by the waste.

SEC. II. — *Actions are also divided into local and transitory.*

Local actions have reference to some particular place, and must be brought in the county where the place is situated. Thus, real actions must be brought in the county where the land lies.

Transitory actions, *i. e.* where the merits of the action have no reference to place, may be brought in any county; subject however, to certain restrictions established by statute for the convenient administration of justice. Thus, actions for breach of contract, or for personal wrongs, such as slander, assault and battery, &c., may generally be brought in any county.

But, by ch. 90, Rev. Stat. § 14, &c., all transitory actions between parties who both live within the State, must generally be brought in the county where one of the parties lives. Otherwise the writ abates, and the defendant is allowed double costs.

Where the plaintiff lives out of the State, the action may be brought in any county. *See ibid.*

Under this provision, it has been held that a citizen of another State may sue a corporation, having a place of business in some particular county, in whatever county in the State he thinks fit. *Allen v. The Pacific Insurance Company*, 21 Pick. 257.

By sec. 15 of ch. 90, Rev. Stat., where there are two or more plaintiffs, the action may be brought in the county where either of them lives. So the action may be brought in the county where either of the defendants lives. But under ch. 100, § 7, Rev. Stat., trustee actions must be commenced in a county where one of the trustees dwells. *See post.*

By sec. 16, where both parties are towns, school districts, or parishes, the action must be brought in the county where one of them is situated. Where the action is between a town, &c. and a natural person, the action may be brought either in the county where the town is situated, or where the natural person lives.

Where one of the parties is a corporation of any other description, the action may be brought in any county in which such corporation shall have any established place of business, &c.; the other party is a natural person, the action may be brought in the county where he lives. See the above case, *Allen v. The Pacific Insurance Company*, 21 Pick. 257. See also Rev. Stat. ch. 44, sections 11 and 21.

By sec. 19, all actions, whether local or transitory, *against the inhabitants of a county*, shall be brought either in the county where the plaintiff resides, or in the county against which the action is brought, or in an adjoining county, at the plaintiff's election.

Actions *by the inhabitants of a county*, shall be brought either in the county where the defendant lives, or in a county adjoining the county which brings the action.

By the Rev. Stat. ch. 90, § 17, penal actions must be brought in the counties where the offences are committed, unless otherwise provided.

By ch. 109, Rev. Stat. § 72, a person summoned to answer as trustee, before a Justice of the Peace, is not held to answer out of the county in which he dwells; and if he is out of the county at the time of the service on him, and shall not return before final judgment, he shall not be chargeable as trustee.

[See Rev. Stat. Maine, ch. 114, § 1—15]

CHAPTER II.

OF THE GENERAL RULE, THAT AN ACTION DOES NOT LIE UNTIL A CAUSE OF ACTION HAS ACCRUED.

Until some injury has been offered, there is no ground for an application to the tribunals of justice for redress. And if an action should be commenced thus prematurely, it cannot be sustained by any cause of action happening afterwards, although of precisely the same nature, because it is apparent that the subsequent cause of action cannot be the one set forth in the first action. And therefore, if the defendant, on the first of *December*, promise to pay on the first day of *January*, no action can be maintained until the first of *January*. See Cro. Car. 575.

In debt upon a bond for payment of money, if it does not become due until after the action is commenced, it will be bad. See 1 Sid. 38.

In debt upon bond for performance of covenants, if a breach be assigned for a time after the action is commenced, it will be bad. *Ibid.*

So in covenant, an assignee cannot recover for a breach before the assignment. Leo. 51.

If a bond is given, conditioned to pay money at several times, it is forfeited by the first failure of payment, and an action may be maintained immediately. 1 Wils. 80.

But if a man by a single bill or bond, without penalty binds himself to pay a sum of money in different portions on different days, debt will not lie until the last day of payment be past. Co. Litt. 292, b.

So, if a man covenants to do any thing at several times, covenant lies after every default. *Ibid.*

Where the surety, on a note which he has discharged, attached the real estate of the principal debtor, on a writ containing a declaration on a note which the surety anticipated to obtain of him, and after obtaining such note attached his personal estate, it was held, that the attachment of the real estate was the commencement of the action, and, as the note on which the suit was founded was not then in existence, there was no cause of action. The attachment, both of the real and personal estate, was consequently dissolved. *Swift v. Crocker*, 21 Pick. 241.

But merely filling up the writ, if no service had been made until after the note had been signed, would not have been fatal to the action. A writ may be considered as made at such time as it was in fact designed by the plaintiff for actual use, where the justice of the case requires it. If the plaintiff can show that his writ was only to be used on a certain contingency, he is allowed so to do. In this action, the attachment was dissolved on the application of certain creditors of the defendant, under the provisions of the Revised Statutes. See *ibid.*

So, where a writ against the indorser of a note, was delivered to an officer, with instructions not to serve it until after he had given the indorser notice of the non-payment of the note by the maker, and the writ was not in fact served until after such notice had been given, it was held, that the action was not commenced until the service of the writ. *Seaver v. Lincoln*, 21 Pick. 267.

Quere, however, the propriety of suffering an officer to be an agent to do any *collateral act*, upon the due performance of which

the plaintiff's right of action is to depend, and note, that in *Gardner v. Webber*, 17 Pick. 407, it was held, that the date of the writ is the time of the commencement of an action, and not the time when it is served. And therefore, if it is dated before the expiration of the statute of limitations, but served after, it will take away the statute.

If a note is made payable *generally*, on a certain day, it becomes due, and an action may be commenced on it at any time on the third or last day of grace; but if it is made payable *at a bank*, there is no default of payment until the closing of business hours at the bank; consequently, no action can be sustained if commenced before the expiration of such business hours, on a note so given. *Church v. Clark*, 21 Pick. 311.

On a note of hand for the payment of money by instalments, action lies upon every default, but the plaintiff must count only for the money due, and not for the whole sum. And. 370.

Where a note of hand is drawn payable after sight, it must be presented for payment before action can be brought. 2 Taunt. 323.

If goods are sold, to be delivered on a certain day, the seller cannot maintain an action *pro tanto*, on each delivery. 2 N. Rep. 61.

No action can be maintained against a consignee of goods for sale, for not accounting for and returning the goods undisposed of, without demand. 1 Taunt. 572.

But when a bill of exchange is dishonored by the drawee's refusal to accept, every one who became a party to it before the holder is immediately liable to him, though before the day at which it is payable. Doug. 551.

If land under incumbrance is sold with a warranty against incumbrances, an action of covenant will lie immediately for the breach, and nominal damages may be recovered; and if, *pending the action*, the plaintiff extinguishes the incumbrance, he may recover the amount in that action, as damages. 20 Pick. 474.

Where it is apparent on the record that an action has been commenced before the cause of action accrued, it may be moved in arrest of judgment, or assigned for error. 2 Lev. 197; Show. 147.

CHAPTER III.

OF THE PARTIES TO ACTIONS, OR THOSE WHO MAY SUE OR BE SUED.

See Com. Dig. Action, B. C.

The following, as well as all common persons, may generally commence suits.

An alien friend.

But an alien enemy cannot sue, though the objection is discouraged.

So, a foreign trading company; and they may sue by their name of reputation. Strange, 612; Ld. Raym. 1532.

So, a foreign sovereign may sue in his political capacity, as well as in his private right. See Dow & Clark, 175.

But, it seems, a foreign government not acknowledged, cannot sue. See 9 Vesey, 347; 11 Vesey, 283.

An idiot or lunatic shall sue in his own name. 1 Pop. 141; 1 Brownl. 197.

An infant may sue by his next friend. By the Revised Statutes of Massachusetts, every guardian has a right to sue for the debts due to his ward, and shall represent him in all legal proceedings, unless where some other person is appointed for that purpose, as guardian or next friend. Ch. 79, § 17.

A person deaf, dumb, and blind, an idiot, lunatic, *non compos mentis*, may be sued; but, if no guardian appeared on their behalf, if a suggestion were made of such disability it is supposed the court would esteem it their duty to appoint a guardian *ad litem*.

A person outlawed cannot sue in his own right, though he may as executor or administrator.

In general, a *feme covert* cannot sue without her husband.

But, it seems, after a divorce from bed and board, if the husband should refuse to pay the alimony, which the court had decreed for the wife's maintenance, she may sue her husband *ex necessitate rei*.

And under the Revised Statutes of Massachusetts, ch. 77, if the husband should abandon his wife, without making sufficient provision for her maintenance, the Supreme Judicial Court, on application made by her for that purpose, and she being of the age of twenty-one years, may authorize her to commence, prosecute, and defend

any suit in law or equity to final judgment and execution, in like manner as if she were unmarried.

Any corporation, or body politic, sole or aggregate, it seems, may sue or be sued.

It is a general rule, that a party cannot be both plaintiff and defendant.

And therefore, where the plaintiff sues as executor, it is a good plea, that the defendant made the promise to the plaintiff's testator, jointly with the plaintiff himself. *2 Chitty's Rep.* 539.

These subjects will be considered more at length in the following chapters.

CHAPTER IV.

OF ACTIONS BY ALIENS.

As a general rule, an alien enemy cannot have any action, real, personal or mixed, in his own right. *Dyer*, 2, b; *Owen*, 45.

And therefore if a debt is due to two parties, one of whom is an alien enemy, it cannot be enforced by the other. See *Roberts v. Hardy*, 3 Maule & Selwyn, 533.

But where an alien enemy is resident in this country, the objection, it seems, would be discouraged as a relic of barbarism. An alien enemy, with or without a safe conduct, resident in this country, and having his domicile here, may be hanged for high treason, and therefore may be considered as owing a temporary allegiance to the country, and as allegiance and protection ought to be correlative and coextensive, he ought to be able to recover on all contracts made with him, as he is liable to be sued for all that he enters into, and ought to have redress for every species of illegal violence or injury offered to his person, property or character.

And accordingly it was held, in England, that if an alien enemy, having property on his person, on which he wishes to obtain money, sends it to a tradesman who is dishonest enough to detain it, will be allowed to recover either the property or the money. See the opinion of C. J. EYRE, in *Sparedburgh v. Bannatyne*, 2 Esp. R. 580.

And a neutral, taken on board an enemy's ship, though then an alien enemy, ceases to be so by leaving their service, and may sue

as an alien friend upon a contract entered into by him as a prisoner of war. *Ibid.*

An alien enemy, with a safe conduct or protection, may sue; 1 Salk. 46; or he may sue as executor or administrator.

After peace, one lately an enemy may sue for rights previously acquired in a state of amity; but, it seems, not for rights acquired during the war, unless recognized expressly or impliedly by the laws. 6 T. R. 28; 13 Vesey, 71; 1 Taunt. 29; Doug. 650; 6 Taunt. 237. If a demand be due to two, and one is disabled as an alien, the other cannot enforce it. 3 M. & Sel. 533.

An alien friend may have a personal action of any kind, and therefore may recover in an action for defamation. 1 Bul. 134.

An alien residing abroad, may be sued in this country if he has any property within the jurisdiction of the court, upon which a judgment may operate; but otherwise, not. *See* Debt on Judgments, *post*.

Under the Revised Statutes of Massachusetts, "when any person shall be disabled to prosecute an action in the courts of this Commonwealth, by reason of his being an alien, subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the actions before mentioned." Ch. 120, § 8.

Under the Revised Statutes, ch. 90, § 44, "No personal action shall be maintained against any person, who is out of the State at the time of the service of the summons, unless he shall have been before that time an inhabitant of the State, or unless an effectual attachment of his goods, estate, or effects is made on the original writ, except in cases in which it is otherwise specially provided.

The exceptions appear in sections 49 and 50 of the same chapter. By section 49, "When an action is brought in this State by any person who is not an inhabitant thereof, or who cannot be found therein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the first action; provided, that the demand in the two cases be of such a nature that the judgment or execution in the one case can be set off against the judgment or execution in the other." And by section 50, "If there are several defendants in the original action, each of them shall be authorized to bring such cross action against the original plaintiff, and upon recovering judgment therein he may be allowed

to set off his judgment against that which may be recovered against himself and his co-defendants in like manner, as if the latter judgment had been against himself alone."

The general law of set-off in Massachusetts, will be found in chapter 96 of the Revised Statutes.

[See Rev. Stat. Maine, ch. 114, § 1—15.]

CHAPTER V.

OF ACTIONS BY AND AGAINST CORPORATIONS.

IN general, a corporation can neither maintain nor be made defendant to an action of battery, or such like personal injuries. See 1 Kyd. 155.

But a corporation may maintain trespass, for a trespass done to their lands. Com. Dig. Franchises, (T 19) *in notis*.

A corporation aggregate, having a fee simple, may maintain a writ of right. But a sole corporation, not having a fee simple, cannot. Co. Litt. 341, b; Fitz, N. B. 5.

A corporation aggregate cannot sue as a common informer. Str. 1241.

It seems a corporation can neither sue nor be sued jointly with another person in England, on account of the difference of process. Com. Dig. Pleader, (2 B. 2.) *Qu*. In cases where a joint action must be brought, or none at all. But in Massachusetts, a joint action has been brought against two contiguous parishes, without any objection on account of the joinder.

When a corporation sues, an attorney should be appointed under the seal of the corporation. 1 Kyd. 268; 1 Salk. 255.

It is held that trespass cannot be maintained against a corporation, but should be brought against the servants of the corporation, who commit the trespass by the authority of the corporation, in whose right such servants may justify. But perhaps this should be restrained to cases where the servants of the corporation, within the general scope of their authority, but without any express command, commit acts which are trespasses or not, according to the extent and nature of the rights of the corporation. For there seems to be no sufficient reason why a corporation may not be liable for a trespass or other tort committed by their express command. See accordingly, 16 East, 6:

It has been held, that a corporation cannot be sued in an action of *indebitatus assumpsit*, because their acts must be under their common seal. But this can hardly be law, because why may not their agent, when appointed expressly for that purpose, under their seal, bind the corporation by a parol contract? See 3 Dal. 495. See also, 10 Mass. R. 514, *where the contrary was held*.

An action on the case may be brought against a corporation for the neglect of a corporate duty to the special damage of the plaintiff. 7 Mass. R. 169.

A corporation must sue and be sued by its corporate name, though a very minute variation is not material; 10 Co. 33. See 11 Mass. R. 338, *where amendment was allowed*.

The members of a corporation, generally, cannot be witnesses for the corporation, but one may be disfranchised for that purpose. Com. Dig. Pleader, (2 B. 2.)

But by the Revised Statutes of Massachusetts, ch. 94, § 54, &c., members of school districts, parishes, religious societies, incorporated mutual fire insurance companies, inhabitants of counties, towns, cities, districts, or precincts, may be witnesses, notwithstanding such interest, in any actions, criminal or civil, where the corporations are parties or interested.

By ch. 44, § 8, Rev. Stat., "When the charter of a corporation expires or is annulled, the Supreme Judicial Court have power, on application of a creditor, or a member, or a stockholder, to appoint receivers or trustees of the corporation to collect the debts, &c., and to prosecute and defend all necessary or proper suits in the name of the corporation.

By the same chapter, the franchise of a corporation is made liable to attachment, and to be taken on execution.

By Mass. Stat. 1839, ch. 158, any corporation in another State, having property in this State, may be sued and the property attached here, and the service of the writ shall be as directed in ch. 90 and 92 of the Revised Statutes.

CHAPTER VI.

OF ACTIONS BY AND AGAINST INFANTS.

AN infant sues by his next friend, or by his guardian specially admitted by the court for that purpose; and the next friend may be

any one who is willing to undertake his cause and become liable for the costs. If the infant sues in this manner, he cannot disavow his *prochein amy*. Com. Dig. (Pleader 2, c. 1.) But after full age, he may proceed in the suit by attorney. 2 Cro. 590.

By the Rev. Stat. ch. 79, § 8, the power of any court to appoint guardians to defend the interests of minors, who are impleaded, as also the power to admit a *prochein amy* to prosecute, is fully recognized.

Where an infant is joined with others, in suing in the right of another, the action may be brought by attorney; 3 Cro. 377; as they all make one person in law. So husband and wife may sue by attorney, though the wife is an infant. 2 Saund. 213.

An infant may maintain an action for a breach of promise of marriage, though the only consideration was the infant's promise, which was voidable. Strange, 937.

But, it seems, an infant cannot sue a *qui tam* action by *prochein amy*. Sayer's Rep. 51.

Under the stat. 1784, ch. 28, § 9, it was held, in *Smith v. Floyd*, 1 Pick. 275, that an infant *plaintiff* is liable to costs. It was held otherwise in England, under the English stat. 23 Hen. 8, ch. 15, in chancery, and at law there were conflicting decisions. The phraseology of the Revised Statutes of Massachusetts seems to leave the subject open, if it were thought expedient to revise this decision.

An infant is liable to an action for necessary meat, drink, lodging, clothing and instruction, all suitable to his condition in life; and necessities furnished to an infant's wife, are such necessities. Str. 168. But, before trusting him the tradesman should inquire whether he is provided for by his friends. Peake, 229.

An infant is liable for a debt due from his wife before marriage, if she were then of full age, and may be arrested for it. Barnes, 95.

An infant is liable to an action for all tortious acts committed by him; as, for a trespass, or for slanderous words, or for money embezzled. 1 Esp. N. P. C. 172. In this latter case, if trover will lie, it will be safer to bring trover; but, if trover will not lie, an action for *money had and received* may be brought, though in form it seems founded on a contract. Peake, 223; Esp. R. 172.

But, it seems, the plaintiff cannot change a contract into a tort, so as to make an infant liable, where otherwise he is not. See 8 T. Rep. 335.

Where an infant and an adult join in a contract, voidable as respects the infant, the adult may be sued alone. 3 Taunt. 307.

An infant is not liable on his bond with a penalty. Cro. Eliz. 928. But his surety will be bound.

But an infant is liable on his single bill, or on his promissory note, if given for necessities, *of which the court will judge*. 1 T. Rep. 41. See Salk. 386.

But, it seems, an infant cannot accept a bill of exchange for necessities. 1 Camp. 552.

If infancy is not a defence to a contract in the country where the contract was made, it will be none here. 3 Esp. R. 163. And the *onus probandi* lies on the infant, to show such contract is void there. *Ibid*.

In an action against an infant, it is not necessary to mention his infancy, and that the articles were necessary. But if the defendant pleads his infancy, the plaintiff may reply, that the articles furnished were necessities; Jon. 146; Str. 1101. Or that the defendant confirmed the promise after full age. 1 Term R. 648.

But a ratification by a person after coming of age, if made under the terror of an arrest, or through ignorance of the law, is not binding. 5 Esp. R. 102.

If an infant, when sued, does not name a guardian to appear by, the court will permit the plaintiff to do it. Str. 1076; 7 Taunt. 488; 2 Wils. 50.

CHAPTER VII.

OF ACTIONS BY AND AGAINST IDIOTS, LUNATICS, &c.

AN idiot, *i. e.* a fool or madman from his birth, or who has no lucid intervals, it is said, must always appear in person, whether he prosecutes or defends. Co. Litt. 135, b.

But a person *non compos, i. e.* who has lost his understanding, may appear by attorney, if of full age, otherwise, by guardian. 4 Co. 124, b; 2 Saund. 235. But how can a person *non compos mentis* appoint an attorney? See, in Maine, Stat. 1845, c. 166.

An idiot or lunatic must sue in his own name, and any one who prays to be admitted as his friend, may sue for him. See 2 Saund. 335.

It has been held in England, if an insane person buys goods on credit, suitable to his rank and condition, of a person who has no notice of his insanity, the seller may recover in an action of *Assumpsit*. See *Bagster v. Portsmouth*, 7 Dowl. & Ry. 614.

But it seems, no action for damages for the non-performance of an *executory* contract could be maintained against an insane person.

In case of a contract with an insane person, without notice of his insanity, where the other party had performed his part of the contract, his proper remedy perhaps might be a *quantum meruit* for his services. *Qu.*

Where a person deals with one insane, the burden of proof of want of notice of the insanity, would seem to fall on the dealer.

CHAPTER VIII.

OF ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

IN general, an executor or administrator, may maintain an action for a breach of any contract, made with the testator. Except, perhaps, a breach of contract of marriage. See 2 Maule & S. 408.

So he may maintain covenant, for any covenant made to the testator for a personal thing, or upon any covenant concerning the realty, broken, in the testator's lifetime. Com. Dig. Administration, (B. 13); 1 Maule & S. 355.

But an executor cannot sue for the breach of a covenant of seizin in fee, made to his testator; nor, for a breach of a covenant for further assurance, since the death, unless the personal estate has been directly impaired by it. 1 Maule & S. 355.

And generally it would seem that an executor cannot maintain an action on any covenants real, which run with the land for breaches happening since the death of the testator. Such actions should be brought by the heir.

An executor, &c. may maintain trespass, trover, &c. for goods belonging to the estate, *taken out of his own possession*, either as executor, or without naming himself executor. In the former case, he may join any count, in the same form of action, which he may have a right to bring as executor; in the latter case, he may join any suitable count, in his own right. But, in either case, it is obvious he will have to account, *as executor*, for whatever property he may recover in right of the estate of the deceased.

In like manner, an executor may maintain debt, for goods of the testator, sold by himself.

It is held, an executor may maintain an action on the case, against the sheriff for an escape of one taken in execution, or for not returning his writ, or for a false return. See Com. Dig. Administration, B. 13, and the various authorities there cited *pro & con*. See also *Ld. Raym.* 973; *Cro. Car.* 297; 1 *Salk.* 12; *Ld. Raym.* 41. But it is said, otherwise of an escape on mesne process. *Ibid.*

As torts generally die with the person, an executor cannot maintain trespass for an assault and battery on the testator, or an action of the case for slandering the testator, &c.

But an administrator or executor, may maintain debt upon a judgment recovered by the intestate or testator, or upon any recognizance, obligation or other specialty or contract made to him.

So, he may maintain replevin for goods taken in the deceased's lifetime. See 6 *Mass. Rep.* 394; *Cro. Eliz.* 377; 1 *Vent.* 187.

Where an executor or administrator, names himself so without necessity, having a good cause of action in his own name, though in the right of the estate, his naming himself, *executor*, &c. is mere surplusage.

Where an executor sues as executor, he cannot join in the same action a count in his own right. *Str.* 1271; 1 *Wils.* 171.

Neither can a count against one in his own right be joined with a count against him as executor or administrator.

But, it seems a count upon a promise to the plaintiff as *administratrix*, for goods sold by her after the death of the intestate, may be joined with a count upon an account stated with her, as *administratrix*.

In determining whether counts can be joined or not, the best rule seems to be, that, if the sums recovered will be assets in the plaintiff's hands, the counts may be joined; otherwise, not. *Bull v. Palmer*, 2 *Lev.* 165. See also *Cowell v. Watts*, 6 *East*, 405. A difficulty, however, may sometimes arise in such cases, with regard to the costs, if the executor should fail in his action.

It has been held, that an action on a bond given to the testator, cannot be joined in an action on another bond given to his executor, *as such*. *Hosier v. Ld. Arundel*, 3 *Bos. & Pul.* 7. In such case, if the executor were allowed to proceed in the joint action, but should die before judgment, to whom could this joint action

survive? The first bond ought to be sued by the administrator *de bonis non* of the testator; the second by the administrator of the executor.

A misjoinder is sufficient cause to arrest judgment.

An executor or administrator cannot join with a surviving promisee; for the surviving promisee alone can maintain the action; neither can an action be brought against an executor or administrator and a surviving promisee jointly. 2 Lev. 228, 229; Fortesc. R. 181.

If money belonging to a testator be received by another person after testator's death, the executor may recover it in his own right, and consequently may join any other claim of his own with it. 2 Term R. 476.

If an executor pays money, which he is entitled to recover back, he should sue in his own right, and must not join with it any claim, *as executor*; though if he only styles himself executor, it will merely be surplusage. 4 T. R. 561.

An administrator cannot commence an action until administration granted. 1 Salk. 303. That is to say, if A, expecting to be administrator on B's estate, should commence an action as administrator, and afterwards should actually be appointed administrator, it will not avail him in that action. In England an executor may bring an action before probate of the will, but cannot *declare* till probate granted. It would seem otherwise in Massachusetts, where those executors alone who accept the trust *by giving bonds*, have any right to commence suits.

By the English law, all the executors and administrators must join in suits. Yelv. 130. But in Massachusetts, those only who accept the trust by giving bonds, need be named either as plaintiffs or defendants. And in England, it does not seem necessary to join, *as defendants*, those executors who do not administer. See Str. R. 783; 1 Lev. 161; 2 Saund. 213.

If there are two executors, and one dies, the survivor alone must sue and be sued. Imp. Pl. 90, 91.

So, if there are two administrators appointed, and one dies, the office survives to the other, who may be sued and may sue alone. 2 Vern. 514.

In suing administrators, all must be joined, because, of course, all are concerned in the administration.

At common law, no action can be maintained against an execu-

tor or administrator, *as such*, where the general issue is *not* guilty; as, for assault and battery by the testator, slander, trespass, nuisance, actions on the case, (*other* than for promises,) trover, or where law wager is allowed. Cro. Eliz. 600; Pl. 330. But, in many cases, by waiving the tort, a sufficient remedy may be had against an executor or administrator, on an implied assumpsit. See Tol. on Executors, 462; Cowp. 376.

By the Rev. Stat. of Mass. ch. 93, § 7 and 9, the actions of replevin, trover, trespass for assault, battery, or imprisonment, trespass for goods taken and carried away, and trespass on the case for damage done to real and personal estate, survive, and such actions may be commenced originally by and against an executor or administrator; or, if commenced by or against the original party, may be prosecuted or defended by or against his executor or administrator. But in such case, the actual damage sustained can be recovered, and not vindictive damages.

An executor or administrator cannot be charged, as such, either for money had and received, money lent to him, or on an account stated of money due from him *as executor or administrator*; these charges make him personally liable. See 1 H. Bl. 106.

But an *instant* *computassent* of money due from the intestate, does not make the administrator personally liable. 1 Hen. Bl. 102.

The executor or administrator of a tenant, may be sued *as such* for breaches of covenant committed by an assignee, to whom the premises have been assigned since the death of the tenant. 10 East, 313.

If there are joint lessees, and one dies, covenant lies against the survivor only. If both lessees die, covenant lies against the administrator of the survivor alone. But, if the lease is joint and several, and one of the lessees dies, covenant, at the option of the lessor, may be maintained against the administrator of the deceased lessee, although all the interest in the lease survives to the other surviving lessee. See *Enys v. Donnithorne*, 2 Bur. 1190.

Any person, who takes upon himself to manage or intermeddle with the goods of a person deceased, may be sued as *executor de son tort*; styling him, however, as executor, as in other cases. 5 Co. 33, b; Salk. 313; Mod. 471.

But mere acts of kindness will not make one an executor in his own wrong; as, taking care of the funeral of the deceased; providing for the children of the deceased; or feeding his cattle; or

making an inventory ; or any acts for the necessary preservation of the property of the deceased before administration is granted.

By ch. 64, § 11, Rev. Stat. of Mass., persons selling or embezzling the property of a deceased person before taking out administration, &c., are made liable as executors *de son tort*.

By the same ch., when from any cause there is a delay in granting administration, the Judge of Probate has power at discretion to appoint a special administrator to collect and preserve the property of the deceased ; such administrator is not liable to an action by the creditors of the deceased.

An executor or administrator, in an action in the right of the deceased, must be styled accordingly ; otherwise, it may be pleaded in abatement. Com. Dig. Pleader, (2 D. 1.)

CHAPTER IX.

OF ACTIONS BY AND AGAINST HEIRS.

For a breach of a covenant real, after the ancestor's death, the heir must sue. But for a breach of covenant real, in the lifetime of the ancestor, the executor or administrator alone may sue, though the covenant was with the ancestor, *his heirs and assigns* only. Vent. 175 ; 2 Keble, 831.

Accordingly, if a man leases for years, and the lessee covenants with the lessor, *his executors and administrators*, to repair and leave in good repair at the end of the term ; and the lessor dies, *his heirs* may have an action on this covenant though not named. 2 Lev. 92.

If a feoffment be made in fee, and the feoffor covenants to warrant the land, or, otherwise, to the feoffee and his heirs, of this covenant, the heir of the feoffee shall have the advantage.

If A covenants with B and his heirs to enfeoff B and his heirs, and B dies before it be done, B's heirs shall take advantage of the covenant. And. 55.

A covenanted with B that he was seized of a good estate in fee, B's heir must sue for a breach and not B's executor. See Wood's Conv. 552. See further Imp. Pl. 124.

An heir who sues in his own right, though he comes to this right by descent, need not name himself *heir*, but, if he sues upon a

covenant or grant of his ancestor, he should be named *as heir*. Com. Dig. Pleader, (221.) And he should show how he is heir. 1 Salk. 355.

At common law, heirs are never bound by covenants, unless expressly named.

An action of covenant may be maintained against an heir on a covenant, by which the ancestor binds himself and his heirs, and it is not necessary to allege the descent of lands; for, if it be not so, the heir must plead it. Willes' R. 585; Dyer, 344, B.

And it seems that it is not necessary, for the plaintiff to show how the defendant is heir; for it may not be in his knowledge. 1 Salk. 355.

An heir is not liable for the debt of his ancestor beyond the value of the lands which descend from him; otherwise he might be charged *ad infinitum*. Str. 665. An heir and a devisee are liable jointly, but *quære*, how contribution shall be made between. See 2 Str. 1270. As respects the plaintiff, no doubt, each is liable for the whole as far as the value of the estate inherited or devised will go; but on an action for money laid out and expended, or a bill in equity, will the amount for which each is eventually liable depend upon the proportion of their respective shares of the deceased's estate? However that may be, it seems the executor is bound to reimburse them, as far as the funds will go. 2 P. Will. 175.

Under the Revised Statutes of Massachusetts, ch. 70, § 13; "after the settlement of any estate by an executor or administrator, and after the expiration of the time, limited for the commencement of actions against him by the creditors of the deceased, the heirs, next of kin, devisees and legatees of the deceased, shall be liable in the manner provided in the following sections, for all debts, which could not have been sued for, against the executor or administrator, and for which provision shall not have been made according to the sixty-fifth chapter, (*which among other things makes provision for the payment of the debts of the deceased, in general, in the ordinary course of administration.*)

By § 14, each of such persons is liable to such creditor, to an amount not exceeding the value, whether of real or personal estate, that he shall have received from the deceased; "Provided, that if by the will of the deceased, any part of his estate, or any one or more of the legatees, shall be made exclusively liable for the debt,

in exoneration of the rest of the residue of the estate, or of the other devisees or legatees, the provisions of the will shall be complied with in that respect; and the persons and estate, so exempted by the will, shall be liable for only so much of the debt, if any, as cannot be recovered from those who are first chargeable therewith; *and provided further*, that no such suit shall be maintained, unless it be commenced within one year, next after the time when the right of action shall first accrue."

By § 15, if any of the heirs, &c. shall die without having paid his just proportion of such debt, his executors and administrators shall be liable therefor, as for his proper debt, to the extent to which he would have been liable, if living.

By § 16, if more than one are liable, the creditor may recover in a bill in equity, against them, &c.; and the court shall thereupon determine, by the verdict of a jury, if either party require it, what sum, if any, is due to the plaintiff; and they shall also decide, according to the course of proceedings in chancery, how much each one of the defendants is liable to pay towards the satisfaction of the debt, and may award execution and other process therefor.

By § 17, in case of the insolvency of one of the heirs, &c. &c. the others shall nevertheless be liable to the creditor, for the whole amount of his debt; provided no one shall be compelled to pay more than the amount received by him from the estate of the deceased.

By § 19, any such insolvent, &c. shall be liable to indemnify such others as have consequently paid more than their just proportion of the debt; for which they may sue jointly, or one or more may sever from the rest, at their discretion, &c.

See the case of *Hall v. Bumstead*, 20 Pick. 2, where a construction is given to some analogous provisions in the act of 1788, ch. 66, § 5, and the proper mode of declaring is pointed out.

[See Rev. Stat. Maine, ch. 120, § 24—28.]

CHAPTER X.

OF ACTIONS BY AND AGAINST JOINT TENANTS, PARTNERS, AND
TENANTS IN COMMON.

IN all real and mixed actions, joint-tenants ought generally to join, having but one joint title, and one freehold. Co. Litt. 189, a.

So they ought to join in trespass and other personal actions, where they are jointly interested. And if two joint-tenants demise their land, reserving the rent to each separately, still they should join in a suit. 5 Mod. 72.

So, joint-tenants should be sued together in real actions concerning the joint estate, as in a *præcipe quod reddat*, writ of entry, formedon, dower, and in a writ of partition brought by one joint-tenant; and if a man and his wife are joint-tenants, they should both be sued.

Tenants in common shall not join in any real action, as they hold by distinct titles. See Litt. § 311; 2 Cro. 231.

But tenants in common must join in personal actions, for a matter concerning their tenancy in common; as, trespass, or case for a nuisance, or debt for rent reserved to them in a joint lease, &c. 1 Sid. 49; 1 Salk. 4; 2 Cro. 231.

So, in a personal action concerning the lands held in common, all the tenants in common must be sued as in trespass *quare clausum fregit*. See Co. Litt. § 323.

Parceners should join in all actions real ancestral, where the right descends to them from the same ancestor. Com. Dig. Parcener, (A 5); Co. Litt. 164.

So, if two parceners are disseized, they ought to join. *Ibid*.

But, if two parceners are disseized and die, their heirs ought to sue severally, for each has a several right; though when they have recovered, they are parceners. Co. Litt. 164, a; Com. Dig. Parcener, (A 5.)

Parceners before partition must be joined, but not after partition. Com. Dig. Abatement, (F 4.)

By the Rev. Stat. of Mass., ch. 101, § 15, "Persons claiming the same premises, as joint-tenants, tenants in common, or co-parceners, may all join, or any two or more of them may join in a suit for the recovery thereof, or any one may sue alone for his particular share."

[See Rev. Stat. Maine, ch. 129, § 17—20, ch. 145, § 12.]

CHAPTER XI.

OF ACTIONS BY AND AGAINST BARON AND FEME.

1. *When the husband must sue alone.*

Where the wife cannot have an action for the same cause, if she survive, the action shall be by the husband alone. Com. Dig. Baron & Feme, (W ;) 1 Salk. 114 ; 1 Sid. 25 ; 1 Lev. 140.

As in an action of trespass for the battery of the wife, *per quod consortium amisit*. 2 Cro. 501, 502 ; Jones, 440.

So in an action of trespass for carrying away after coverture things severed from the freehold of the wife, the husband must sue alone, as they become absolutely his property by the marriage.

Where a husband sustains a special damage by the slander of his wife, he must sue alone. 1 Sid. 346 ; 1 Lev. 140. But for a slander to the wife, actionable *per se*, i. e. without special damage, they must join. The reason seems to be, because, if in the first the husband dies without bringing an action, the wife surviving can have no action for the special damage. But, in the latter case, if the husband dies without bringing action, the wife may bring an action.

Where an assault and battery are committed on both husband and wife, he cannot sue for both in one action. For the assault and battery on himself, he *must* sue alone ; for the assault and battery on his wife, he *must* join her. 2 Ld. Raym. 108.

For a similar reason, trespass for the goods of the wife, taken before coverture, cannot be joined with trespass for taking the husband's goods after coverture. In the former case, the husband and wife *must* join ; in the latter, the husband must sue alone.

2. *Where the husband may sue alone, or join his wife, at discretion.*

In actions for a profit accrued, during the coverture, to the husband in right of his wife, he may either join his wife or sue alone. Com. Dig. Baron & Feme, (X.)

So, also, for a breach of covenant, in relation to the wife's land after coverture, the action may be by the husband alone, or he may join his wife. 2 Cro. 399.

If the cause of action be only commenced before coverture, and completed afterwards, the husband may sue alone, or husband and wife may join ; as in trover, where the goods were lost before mar-

riage, and the conversion was after. 1 Sid. 172; 2 Lev. 107; 1 Vent. 261; Com. Dig. Baron & Feme, (X.)

So, if a woman lease for years, rendering rent, and afterwards marry, the husband and wife may join in debt for the rent, or the husband may sue alone for it. *Ibid*, Palmer, 207.

In general, where the wife is the meritorious cause of action, the husband may join his wife, or he may sue alone. 2 Cro. 77, 205; 1 Salk. 114.

Whenever the action will survive to the wife, she may be joined, although in such cases the husband is not always *bound* to join her. 1 Free. 236.

Where the wife is joined, the nature of her interest, unless necessarily implied, should appear in the declaration. 2 New R. 405; 2 Bl. R. 1236; 2 Caines' R. 221.

In cases where the husband may sue alone or join his wife, at discretion, if he sues alone and dies before judgment, his administrator will come in and prosecute; and the right of action will not survive to the wife, because, by suing alone, the husband declares or manifests his intention to appropriate the cause of action to himself. But, in such case, if he joins his wife, he shows no such intention, and therefore his wife will prosecute the action by survivorship to her own proper use. *Qu.*

An action may be commenced by the husband alone on a promissory note given her after marriage, or he may join his wife.

So, whether joint lessors, or joint lessees, the husband and wife jointly may maintain covenant for a breach of the covenants in the lease, or the husband may sue alone at his discretion. *Aleberry v. Walby*, 1 Str. 129.

3. *In what actions husband and wife must join.*

It is laid down, as a general rule, that whenever the cause of action will survive to the wife, she must be joined. 1 Wils. 224. *Dunstan & wife v. Burwell, &c.* But this will not hold good as a general rule. It should be, *that, whenever it is not in the power of the husband to destroy the wife's survivorship, they must be joined.* For, in all cases, where the husband may join his wife or sue alone, at his discretion, by suing alone he destroys his wife's survivorship. *Qu.*

In all real actions for the wife's land, the husband and wife ought to join. 1 Bul. 21.

So, in personal actions for a chose in action due to the wife before

marriage, as in debt upon a bond made to the wife before marriage, they ought to join. Cro. Eliz. 537; 3 T. R. 631.

For the same reason, the husband and wife must join in trover, upon a conversion of the wife's goods *before marriage*; and in trespass, for a trespass *before marriage*; and in assumpsit, upon a promise to the wife *before marriage*.

For a personal wrong to the wife, as battery or false imprisonment, the husband and wife must join. Yelv. 89; 2 Cro. 501; 1 Salk. 119.

So, in an action for a thing due to the wife *en autre droit*, as executrix, &c., they should join. See 5 Johns. R. 66.

So, in trespass, for treading down the grass of the inheritance of the wife, they should join. Bunb. 277.

But in trespass for carrying away, after marriage, things *severed from the freehold*, the husband must sue alone. Because things *severed* from the freehold, belong to the husband, and go to his executor and not to his wife, after his death. See Cro. Eliz. 133; 2 Wils. 424.

For the same reason, a declaration for money "lent by husband and wife," after marriage, will be bad, and judgment will be arrested for that cause after verdict; the declaration is false, because she can have no money after her marriage; and the conclusion, *to their damage*, vitiates the action. In such case, the action should be brought by the husband alone. *King & uxor v. Basingham*, 8 Mo. 341.

4. *What actions must be brought against husband and wife.*

For a debt due from the wife before coverture, the husband and wife must be joined. Com. Dig. Baron & Feme, (Y); 15 Johns. R403.

Real actions for the land of the wife, must be brought against husband and wife. *Ibid.*

So an action, which charges the husband for an act of his wife done before coverture; as trover upon a conversion before marriage, must be brought against both. Co. Litt. 551, b.

So, in debt for rent due before coverture, upon a lease made to the wife, the husband and wife must be jointly sued.

Debt must be brought against both, for rent due on a lease, which the wife has as executrix or administratrix.

For a tortious act, done by the wife *alone*, after marriage, the husband and wife must be joined. Com. Dig. Baron & Feme, (Y.)

In the late case, *Hayward v. Hayward*, 20 Pick. 517, the law on the subject of joinder in action by husband, is incidentally discussed. The point of that case is, "if a distributive share of personal estate accrue to the wife *during coverture*, and the husband die before the decree of distribution, *and without any act on his part reducing it to possession*, it survives to the wife. *Sed quære* of the last clause in italic, "*without any act on his part reducing it to possession.*" How can the husband reduce it to possession before the order of distribution? Can he assign it before the order of distribution, so as to prevent the wife's survivorship in case he dies before the order is granted?

5. *In what actions husband must be sued alone.*

An action for a tort done by the husband and wife *jointly*, (or, as it seems, by the wife *in his presence*,) must be brought against him alone, as it is intended to be his act. Pal. 343. But, if the tortious act is done by the wife alone, the husband and wife must be sued jointly. 1 Leon. 312.

In all cases, where the husband alone is answerable, he alone must be sued. As, in cases of simple contract signed by both. 4 Leon. 42.

And for the same reason, in cases of covenants in deeds respecting real estate, where he alone is bound.

So debt lies against the husband alone, for rent incurred during coverture, upon a lease made to the wife before marriage. Co. Litt. 556.

Two persons sued as man and wife, may plead a *divorce* between them. See Cro. Eliz. 352, where the writ was abated for that cause.

6. *What actions the husband shall have by surviving his wife.*

For choses in action, accruing to the wife before coverture, the husband can maintain no action after her decease, except as an administrator on her estate. Co. Litt. 317; 3 Mod. 186.

But it seems, generally, that all actions, in which the husband *must* sue alone, during coverture, he may have in his own right, if he survives his wife.

The husband, after his wife's death, shall have an action for any thing incurred during the coverture; as debt for rent due during coverture.

For his wife's earnings during coverture, he may have an action after her decease; and even if she survives him, his representatives shall have the action. See 6 John. R. 112.

7. *What actions the wife shall have by surviving her husband.*

All choses in action, debts by obligation, &c., belonging to the wife before marriage, if not collected by the husband during the coverture, or transferred by him for a valuable consideration, will survive to the wife. 3 Mod. 186.

So, also, actions relating to her freehold or inheritance, and injuries done to her person. See 1 Rol. 350; 17 Johns. 271.

In all cases, where it is at the husband's option, whether to join his wife or not, if he joins her, it is considered a presumption that he intended that the property should survive to her. Yelv. 1.

And generally, in all those cases where the husband and wife must join if she survives him, the cause of action survives to her, and does not go to her husband's executor. 1 Rol. 342, 2729.

If the wife survives, she shall have trespass for a trespass to her land during coverture. Pal. 313.

If husband and wife recover in a real action, and the husband dies, the wife shall have execution and not the husband's executor. 3 Atk. 20; 1 Vern. 396. So for a debt due to the wife. 3 Atk. 20; 3 Mo. 186.

To bar a wife's right of survivorship to choses in action belonging to her *before marriage*, there must be judgment and execution at suit of the husband and wife; judgment alone is not sufficient. See Clancy's Rights of Women, 112, 113. To bar her right of survivorship to choses in action *during coverture*, judgment alone, recovered by the husband in a suit by him *alone*, is sufficient.

In the latter case, if he joins her in a suit and recovers judgment and dies, the judgment survives to her. Aleyn, 36.

8. *What actions may or may not be maintained against the husband after his wife's death.*

During marriage, the husband is liable for all his wife's debts contracted before coverture. But they must be collected during the marriage; he is not liable after her death. 1 Camp. 189; Com. Dig. Baron & Feme, (2 C.)

If a woman, lessee for life or years, takes husband and dies, he is liable for the rent incurred during the coverture, because he takes the profits of the land. 1 Lev. 25.

If there be judgment against husband and wife, upon a bond of the wife, who dies before execution, the husband shall be charged. 1 Sid. 337; Lut. 671.

If judgment is recovered against a woman while *sole*, and she

afterwards takes husband and dies, the husband shall not be charged upon this judgment. But, if judgment is recovered against both, for her debt while sole, in that case, the judgment will survive against him. See 3 Mo. 186. This is agreeable to analogy; for, if husband and wife recover judgment for a debt due to her, it survives to the husband. 1 Mo. 179. *Scire facias* was awarded to him. See Cro. Car. 208.

9. *What actions may be maintained against the wife after the husband's death.*

Whatever debts the wife owes before marriage, and which are not paid during the husband's life, revive against the wife after his decease. Gil. Cas. 361; 1 Camp. R. 169.

Actions in which it is necessary to sue husband and wife, survive against the wife after his death. See *Mitchenson v. Hewson*, 7 T. R. 348.

And as the husband is not liable for such debts after a divorce *a vinculo*, it is presumed they revive against the wife, in such case, as they would survive against her if he were dead.

10. *Further remarks respecting actions in which husband and wife are concerned.*

Two actions, one against a man and his wife, and the other against the man alone, cannot be consolidated. 2 Wils. 227.

A husband is liable for debts contracted by his wife after coverture, with or without his consent, in the following cases:—

1. Where she has been obliged, by his misconduct, to leave the house and take up necessaries. 4 Esp. C. 41; 11 Johns. R. 281.

2. Where he turns her out of doors without sufficient cause, he will be liable for necessaries for her to the person who furnishes her, and this, even if he gives a general notice to every one not to trust her. And, if she employs an attorney to exhibit articles of the peace against her husband for his ill usage, the husband will be liable to the attorney. See *Bolton v. Prentice*, 2 Str. 1214; 3 Camp. 326.

In what cases the husband will be discharged from liability for his wife's debts, on the ground of allowing her a separate maintenance, sufficient, according to his circumstances, and punctually paid, with notice or knowledge of these facts to the person giving the credit, see examined at length in Clancy's Rights of Women, 28, &c.

3. If the husband, having the goods purchased by his wife in

his possession, or under his control, does not return them to the tradesman, he will be liable, in cases where otherwise he would not. 1 Camp. 120.

4. Where the goods furnished the wife are suited to the appearance he permits her to assume, how far soever above his means, if he has not forbidden tradesmen from contracting with her, he will be liable. See 1 Camp. 120 ; 5 Taunt. 356.

5. In all cases, where a man holds a woman out to the world as his wife, he will be answerable for her contracts as if really so, even to those who know the facts ; otherwise, after they separate. 4 Camp. 215.

6. A man having a wife, who marries a second, will be liable for necessaries furnished the second wife during the cohabitation, unless the plaintiff know the facts ; in which case he cannot recover. 1 Camp. 245.

7. If a woman leaves her husband without fault on his side, and afterwards offers to return to live with him, and he refuses to receive her, he will be liable to any one who afterwards provides her with necessaries, *if she has not committed adultery*. See 11 Johns. R. 281 ; 12 Johns. R. 293 ; See, however, 6 T. R. 603 ; 1 Bos. & P. 338.

8. If he receives her again after an elopement, *even if she has committed adultery*, he will be bound in every case, as he would have been if she had not eloped, for necessaries furnished her. See 4 Esp. R. 41. His receiving her back, will be considered as a pardon and forgiveness of her crime.

But a husband will not be liable for the debts of his wife : —

1. While she is living with him and properly provided for by him, according to his standing and ability, after notice given by the husband to tradespeople not to trust her. Before notice, he will be liable, because his assent will be implied to all contracts made by her for the use of the family, or for her own private use, if conformable to the appearance which he allows her to make.

2. For articles furnished the wife for the purpose of eloping, or after elopement, the husband will not be answerable, though the person furnishing know nothing of the purpose, or has no notice. Str. 647, 706.

3. It seems to be the better opinion, that if the wife lives apart from the husband, and has a separate maintenance, which is regularly paid, a tradesman, having actual or implied notice of the facts,

cannot recover from the husband the amount of necessaries furnished to her, by him; and perhaps too, if without such notice, he omits to make those inquiries which her situation would naturally suggest. See 3 Esp. R. 285; 8 Johns. R. 72. See also *Clancy's Rights of Women*, 28, and the cases and authorities there cited.

11. *In what cases a married woman may sue, as a feme sole.*

In England, a wife may sue and be sued, as a *feme sole*, in the following cases:—1. Where the husband is banished. 2. Where the husband is transported; the wife may sue and be sued as a *feme sole* during the period. 3. So, where the husband exiles himself after committing a crime. See *Newsome v. Bowyer*, 3 P. 37. The wife of an alien enemy may be sued and may sue as a *feme sole*. 1 Ld. Raym. 147. 5. But, the wife of a natural born subject, is not thus rendered *sole*, by the voluntary departure of her husband from the kingdom. 1 New Rep. 80. 6. So, the wife of an alien who has been in England, is not rendered *sole* by his leaving England. 3 Camp. R. 123; *Marshall v. Rulton*, 8 T. R. 545. 7. But, if the husband has never been in England, it seems the wife may sue and be sued as a *feme sole*. 3 Camp. 123.

A wife living in adultery, separate from her husband, is not liable for her contracts, and it seems generally that a married woman is in no case liable on her contracts so long as her husband is within the kingdom. See *Clancy's Rights of Women*, 66, and the various cases and authorities there cited. The above doctrine in general has been recognized as part of the common law in Massachusetts. See the learned opinion of Justice PUTNAM, in *Gregory v. Paul*, 15 Mass. R. 33.

In Massachusetts, it has been decided, that a married woman, being divorced *a mensa et thoro*, may recover her alimony in a suit against her husband. 1 Mass. R. 341.

Under the Rev. Stat. of Mass., ch. 77, in case of the husband, without making sufficient provision for his wife, the Supreme Judicial Court may authorize the wife on her petition for that purpose, to sell and convey her real estate; or any part thereof, and also any personal estate, which shall at any time have come to the husband, by reason of the marriage, and which may remain within the State undisposed of by him, &c., &c. She may also be authorized to commence and defend suits in law or equity, &c. as if she were

sole and unmarried. These powers are to continue until the husband returns and claims his marital rights.

The same authority may be granted to the wife, if her husband is sentenced to the State prison.

If a married woman comes into this State without her husband, he having never lived with her within this State, she may transact business, make contracts, and commence, prosecute and defend suits in her own name, and dispose of her property, which may be found here, in like manner, in all respects, as if she were unmarried. The arrival of the husband afterwards is to have the same effect, as if their marriage first took place at that time.

[See, in Maine, Stat. 1844, ch. 117; Stat. 1847, ch. 27; Stat. 1848, ch. 73.]

CHAPTER XII.

OF ACTIONS BETWEEN, BY, AND AGAINST PARTNERS IN TRADE, JOINT CONTRACTORS, &c.

As a general rule, if the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties, otherwise the action may be abated by plea; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties at his discretion. In the former case, if the execution or judgment is satisfied by one of the contractors, he may have an action for contribution, against the others; but one *tortfeasor*, though he pay all the damages, cannot maintain an action for contribution against the rest.

Where all the partners die, the executor or administrator of the one who survived the rest, is alone answerable at law; in equity it is otherwise. See 1 Binney, 123.

A dormant partner, *i. e.* one whose name does not appear in the firm, but who is entitled to share the profits with the others, may be sued with the rest of the firm, or he may be omitted, at discretion. 4 M. & S. 475; 7 T. R. 361, *in notis*.

An ostensible partner is liable, and any one, who suffers his name to be used as a partner, whether beneficially interested or not, may be sued with the rest of the partners. No private arrangement or understanding among the partners themselves, can prevent this consequence. 1 Camp. R. 99, n.

But by Mass. Rev. Stat., limited partnerships are permitted under certain restrictions. Ch. 34.

An infant partner must not be joined in a suit, though he must join. 3 Esp. R. 76.

Where one partner pays a partnership debt, he may maintain an action for money laid out and expended, for the proportion which his partner should have contributed. But, if the partnership consists of three, and two of them pay a partnership debt with their private funds, must they join or sever in their suit? And perhaps this may depend upon the manner in which the payment is made. For, if they paid the partnership demand out of any joint funds belonging to those two only, they must join; but, if each of them, severally, contributes one moiety of the whole debt, it would seem each of them ought severally to sue the third for a moiety of that third part which he ought to have paid, but which they have severally paid on his account. See 5 East, 225.

If A is a partner in two distinct partnerships, it is said no contract can be enforced at law between those two partnerships. 2 Bos. & Pul. 120; 6 Taunt. 597. Because the same person (A) cannot be both plaintiff and defendant in the same suit. See Gow on Partnership, 159.

Where several persons, forming a party, dine at a tavern together, they are *jointly* liable for the whole expense, and not each for himself alone. *Forster v. Taylor*, 3 Camp. 49.

All the partners must join in bringing an action. The omission is ground for a nonsuit on the trial. Imp. Pl. 326. Infancy in one of the partners will not excuse the omission. He must join with the rest. 14 East, 211.

In general, personal torts are of a *several* nature, and a joint action cannot be maintained for them; but each injured person must sue, separately, for the injury done to himself. But an action for slander may be maintained by a firm, for words spoken of them in reference to their trade. See *Cook v. Bachelor*, 3 Bos. & Pul. 150. But, suppose their interest in the partnership to be unequal, in what proportion shall the damages recovered be divided between the partners? Equally, or in proportion to their interests?

A surviving partner must sue alone for the partnership debts, and cannot join the executors or administrators of the partners deceased, in the suit. And the executor or administrator of the last survivor must also bring the suit alone, and cannot join the executors or administrators of the other deceased partners. A surviving partner may join a count, for money due his partnership, with a count for money due to himself alone. 2 T. R. 476; 6 T. R. 582.

A dormant partner may join in the suit or not, in all cases where the interest of the defendant cannot be injuriously affected by it. 2 Taunt. 325 ; Gow on Partnership, 164 ; 2 Esp. R. 468 ; 3 Esp. R. 238.

A merely nominal member of a partnership need not join, if it can be shown, that he has no interest in the firm ; and this nominal partner may be called as a witness for that purpose. 5 Esp. R. 199.

If one of a number of joint contractees sues, and the defendant omits to plead the fact in abatement of the writ, he cannot subsequently, in a suit brought by the other contractees, plead the non-joinder in abatement ; the omission has operated as a severance. See 6 Mass. R. 460 ; 5 Bur. 2611 ; 2 Bl. R. 695 ; Gow on Partnership, 221.

But, in cases of severance, by paying one or more of the contractees, or by thus omitting to plead in abatement the non-joinder of parties, must the remaining contractees sever also in their suits, or may they join ? From analogy, it would seem, they must sue severally ; but why should the act of the other contractees compel these to sever against their own consent ?

Under the Rev. Stat. ch. 100, if the defendant pleads non-joinder of any other person as defendant in an action grounded on a contract, the court, at any time before issue joined, may allow the plaintiff to amend, on terms, &c., by inserting the name of such person as defendant, and thereupon a new writ may be taken out and served, &c. &c.

One tenant in common, or joint-tenant of any personal thing, cannot maintain trover against his companion for any thing still in his possession, because the possession of one is the possession of both ; and, in such case, if one of them, A, could maintain an action to recover possession of the article, as detinue or replevin, after he should have recovered it, the other, B, might, by parity of reasoning, have a similar action to recover it back again, one having as much right to the possession as the other. This would be absurd. But, if one keeps possession, the other may have account or some other suitable action against him, to recover a share of the profits. Or, if one should destroy or sell the article, the other may maintain trover or account, according to the circumstances of the case. See 3 Johns. R. 175 ; 4 East, 121 ; 1 Taunt. 241 ; 4 Taunt. 24 ; 4 East, 110.

CHAPTER XIII.

OF THE PROPER NAMING AND DESIGNATING THE PARTIES TO ACTIONS, &c. &c.

§ 1. *Of additions in general.*

In the commencement of actions, each party should be designated by his name at full length, with the name of the town and county in which he resides, and the addition of his degree or mystery. Misspelling is not fatal if *idem sonans*. 2 Str. 889 ; 10 East's R. 83.

If there are father and son of the same name, the son should have the addition of *junior* to his name, though it seems any other distinction would be sufficient. 1 Salk. 7.

In this Commonwealth, there being no nobility, there are three degrees only, viz. esquire, gentleman, and yeoman, and in practice these distinctions are not very closely observed, as it is not unusual to style one, who is merely a gentleman, esquire.

If a man has a cause of action against another by reason of his office, the official capacity should be stated, as against a sheriff, parson, heir, executor, administrator, besides his other name and addition. Com. Dig. Abatement, (F. 20.)

Women are most usually designated by the addition of their estate, as widow, singlewoman, spinster, or in case of a married woman, as wife of A. B. &c., but wherever they follow any occupation, that addition may be added.

A man may be sued by the addition of any lawful occupation, as merchant, mercer, tanner, husbandman, scrivener ; but the addition of a general occupation, as farmer, it is said, is not good ; and the addition of an office alone is not good, as servant, butler ; but servant to A. B. is good. Com. Dig. Abatement, (F. 26.)

An addition of an unlawful employment is bad, as usurer, extortioner, bankrupt, maintainer, vagabond. *Ibid.*

The addition should be the same as it was on the day of purchasing the writ, and not *lately*, &c. *Ibid.*

By the Massachusetts Rev. Stat. ch. 90, § 54, when the name of any defendant is not known to the plaintiff, the writ may be issued against him by a fictitious name, and, if *duly served*, it shall

not be abated for that cause, but may be amended on such terms as the Court shall think reasonable.

It would seem in any such case, that the service ought to be personal, for if a summons were left at a house, with a fictitious name inserted, how can it be made to appear for whom it is intended?

§ 2. *Usual manner of naming the defendant, stating his addition and particular office, in relation to the capacity in which he is sued.*

Against an administrator.

— attach the goods and estate, which were of C. D. (*the intestate*), late of, &c., gentleman, deceased, in the hands and custody of A. B. of, &c. aforesaid, esquire, administrator of the goods and estate of the said C. D., and summon the said A. B. as administrator as aforesaid, to answer, &c.

Against a surviving administrator.

[Proceed as before, with the substitution of *surviving administrator*, instead of *administrator*, merely.]

Against administrator *durante minori etate*.

[Follow the expression in the letters of administration, and in the declaration over that the executor is under age.]

Against administrator *de bonis non* with the will annexed.

— administrator of the goods and estate which were of C. D. (*the testator*), at the time of his decease, with the last will and testament of the said C. D. annexed, not administered by G. H., formerly executor of the said will, &c.

Against administrator with the will annexed.

— administrator of the goods and estate, which were of C. D., at the time of his decease, with the last will and testament of the said C. D. annexed.

Against husband and wife, administratrix.

— A. B., and C. D. his wife, which said C. D. is administratrix of the goods and estate of the said E. F. (*the intestate*), and summon the said A. B. and C. D. in her said capacity, &c.

Against an executor.

— attach the goods and estate of A. B. late of, &c., gentleman, deceased, in the hands of C. D., of, &c., esquire, executor of the last will and testament of the said A. B., and summon the said C. D. in said capacity, &c.

Against a surviving executor.

— [*as before*,] surviving executor of the last will and testament of the said A. B., &c.

Against husband and wife, executrix.

— C. D. of, &c., gentleman, and E. his wife, which said E. is executrix of the last will and testament of G. H., late of, &c. gentleman, deceased, and summon the said C. D., and E. his wife in her said capacity, &c.

Against executor *de son tort*.

[*An executor de son tort is named merely EXECUTOR, as if he really were an executor.*]

Against heir and devisee.

— summon A. B. of, &c., gentleman, son and heir of C. B., late of, &c., esquire, and C. D. of, &c., gentleman, devisee of the said C. B. &c.

NOTE. An heir and a devisee may be sued jointly.

§ 3. *The usual manner of naming the plaintiff, and stating his addition and particular office, in relation to the capacity in which he sues.*

NOTE. *In most of the beginnings of declarations on the part of the plaintiff, the expressions may be the same, as in those on the part of the defendant.*

By an infant.

— to answer to B. an infant under the age of twenty-one years, who sues this action by C. D. of — &c. esquire, his next friend, [*or, if so, his father and next friend.*]

NOTE. An infant is sued like any other person, and if he pleads his infancy, it may be replied, that the account is for necessities furnished suitable to his degree and circumstances; and if, on the trial, it should turn out that the quality of the articles is superior to what might have answered for him, still if of equal benefit or use to the infant, he shall be liable for the value of such as would have been suitable to his situation.

By a corporation.

To answer to the *President, Directors, and Company of the, &c.*, [or however the corporation may be named in its charter. Any material variance from this name is fatal, and therefore it is best to follow it *verbatim*.]

Towns or Counties should be named thus :

— the inhabitants of the town of, &c., to answer to the inhabitants of the town of, &c.

By an executor of an executor.

To answer to A. B. of, &c., executor of the last will and testa-

ment of C. D. of, &c. deceased, who was the executor of the last will and testament of E. F. deceased, &c.

NOTE. In the English practice profert is made of the letters testamentary both of E. F. and of C. D., because where there is but one executor and he dies, the executor of that executor shall have the action, and so *ad infinitum*. But in Massachusetts no executor of an executor, as such, has any control of the first testator's estate, but administration *de bonis non* is granted of it.

By an idle person under guardianship.

To answer to B of — &c. who sues by A of — &c. his guardian, the said B being under guardianship, to prevent his wasting his estate by idleness and excessive drinking, &c.

By an informer who sues a *qui tam* action.

To answer to A. B. of, &c., who sues as well for the poor of the town of, &c., as for himself.

§ 4. *The proper naming of the pleas or actions.*

Assumpsit.

To answer to A. B. of, &c., gentleman, in a plea of trespass on the case, *or*, in a plea of the case.

Account.

In a plea that he render the plaintiff a reasonable account, *or*, in a plea of account.

Case.

In a plea of the case, *or*, in a plea of trespass on the case; [*this is proper in trover, slander, &c.*]

Covenant.

In a plea of breach of covenant, *or*, in a plea of covenant broken.

Debt.

In a plea of debt.

Detinue.

In a plea of detinue.

Ejectment.

In a plea of ejectment.

Trespass.

In a plea of trespass.

Waste.

In a plea of waste.

REAL ACTIONS.

Dower.

In a plea of dower.

Writs of entry, formedon, right, &c.

In a plea of land.

Partition.

In a plea of partition.

§ 5. *Statement of title.*

Seizin in fee simple.

— seized in his demesne as of fee of and in the tenements, with the appurtenances hereinafter mentioned, &c.

Seizin in fee in husband and wife, in her right.

— A. B., and C his wife, seized in their demesne as of fee, in right of the said C, of and in the tenements, &c.

Seizin in tail.

— seized in his demesne as of fee tail of and in, &c.

Seizin in special tail.

— seized in his demesne as of fee tail, viz. to him and the heirs lawfully issuing out of the body of him the said A. B., on the body of C. B. to be begotten, of and in the tenements, &c.

Seizin for life.

— seized in his demesne as of freehold, for the term of his natural life [*or, if so, for the term of the natural life of G. H.*], of and in the tenements, &c.

Seizin for life by a rector in right of his rectory.

— seized in his demesne as of freehold, in right of his rectory, of and in the tenements, &c.

Tenancy by the courtesy.

— seized of the tenements, &c., in his demesne as of freehold, for the term of his life, as tenant thereof by courtesy, &c.

By assignee or executor of lessor being a termor.

— lawfully possessed of the tenements, &c., for the residue and remainder of a certain term of — years, commencing from, &c. to come and unexpired therein.

Seizin in fee in reversion after an estate for years.

— seized in his demesne as of fee, of and in the reversion of a certain messuage, &c. with the appurtenances, immediately expectant upon the determination of a certain term of — years, commencing from, &c., to come, and unexpired therein.

Seizin in fee in reversion after an estate of freehold.

— seized as of fee, [*omit "in his demesne,"*] of and in the reversion of a certain messuage, &c., with the appurtenances, imme

diately expectant upon the death of G. H., who was seized of the said messuage, &c. as of freehold, as tenant thereof, &c.

Interest in a term of years, to commence after a freehold.

— possessed of the interest of a term of — years, expectant upon the death of the said G. H.

Joint-tenancy.

— E. F. and G. H. who were seized as joint-tenants in their demesne as of fee, of and in the tenements, with the appurtenances, &c.

Allegation of the death of one, and the sole seizin of the survivor, &c.

— and being so seized, the said G. H., afterwards, and in the lifetime of the said E. F., viz. on, &c. died so seized as aforesaid, &c., and the said E. F. then and there survived him; whereupon the said E. F. then and there became sole seized of the said, &c.

Coparcenary.

The said E. F. and G. H. were seized in their demesne as of fee, of and in the said tenements with the appurtenances, as children and coheirs of one J. K., deceased.

Tenancy in common.

— one E. F. was seized in his demesne as of fee, of and in one undivided moiety, the whole into two equal moieties to be divided, of and in the said tenements, with the appurtenances; and one G. H. was also then seized in his demesne as of fee, of and in the other undivided moiety, of and in the same tenements, with the appurtenances, &c.

§ 6. *The transmission or deduction of title.*

Title by descent in fee.

— and the said E. F. being so seized as aforesaid, afterwards, viz., on, &c., at, &c., died, whereupon the said, &c., with the appurtenances, descended to the said A. B. as son and heir of the said E. F. deceased, and thereby the said A. B. then and there became seized in his demesne as of fee, of and in the said, &c.

Title by succession as rector.

— and the said E. F. being so seized as rector as aforesaid, afterwards, viz. on, &c. at, &c. died, and thereupon, afterwards, viz. on, &c. at, &c. the said A. B. was, in due form of law, *presented to the said rectory, and lawfully instituted and inducted into the same*; whereupon the said A. B. then and there became, and still is, rector of the said rectory, and the lawful successor of the said E. F. therein; and the said A. B., as such rector as aforesaid, then and there became, and from thence hitherto hath been, and still is

seized in his demesne as of freehold in right of his said rectory, of and in the said premises, &c.

Seizin by marriage.

— and the said C. being so seized of the said, &c., afterwards, on, &c. at, &c. took to her husband A. B., by virtue whereof the said A. B. and C. then and there became seized of the said, &c. with the appurtenances, in their demesne as of fee, in right of the said C.

Seizin by deed.

— and the said E. F. being so seized as aforesaid, afterwards, on, &c. at, &c., by his deed of that date, duly executed, [*or, sealed with his seal, and by him delivered and*] acknowledged, and recorded, gave, granted, bargained, and sold, [*according to the words and operation of the deed, relied on*] the said premises, to the said A. B., to have and to hold the same to the said A. B. and his heirs and assigns, forever. By virtue whereof, he, the said A. B., then and there became seized of and in the said premises with the appurtenances, in his demesne as of fee.

Title by devise in fee simple. (*English form.*)

— and the said E. F. being so seized as aforesaid, afterwards, *viz. on, &c. at, &c. made and published his last will and testament in writing, bearing date &c., and signed by the said E. F. and attested and subscribed in the presence of the said E. F. by three credible witnesses, according to the form of the statute in such case made and provided, and thereby (among other things) gave and devised the said premises with the appurtenances, unto the said A. B. to hold unto, and to the use of the said A. B. and his heirs and assigns forever; and the said E. F. afterwards, viz. on, &c. at &c., died so seized of the said premises, without altering his said will, as to his said devise of the said premises: whereupon and whereby the said A. B. then and there became seized of the said premises in his demesne as of fee, &c.*

Or, for the words in italics, in most of the States, the following may be substituted:

— made his last will and testament in writing, and thereby (among other things) gave and devised the said premises with the appurtenances, unto the said A. B., to hold to the use of the said A. B. and his heirs and assigns forever; and afterwards, *viz. on, &c. at, &c.*, the said E. F. died so seized of the said premises; and after-

wards, viz. on, &c. at, &c., his said will was duly proved and allowed before R. M. Esquire, Judge of Probate of wills, within and for the county of, &c. ; whereupon and whereby the said A. B. then and there became seized of the said premises in his demesne as of fee, &c.

CHAPTER XIV.

OF THE SERVICE OF WRITS.

The object of serving a writ, is principally to give the defendant notice of the institution of a suit against him, so that he may have an opportunity of contesting the justice of the demand, if he thinks proper. In order that the defendant may have a sufficient time for that purpose, and in order to prevent unreasonable delay, the Legislature has established certain regulations applicable to the different cases of most frequent occurrence, which must be strictly observed. A material defect in this respect will be sufficient ground to abate the writ, in all cases by plea, and in most cases on motion, if the defect is apparent on the face of the writ.

§ 1. *The time of service.*

In Massachusetts, the service of writs or other civil process, is forbidden from midnight preceding to midnight following the Lord's day ; the service is made void, and the person serving or executing such process is made liable to damages, as if he had not had any such process. Rev. Stat. ch. 50, § 7.

In general, writs must be served fourteen days, at least, before the first day of the term at which they are returnable, if before the Court of Common Pleas, or seven days before the return day, if before a Justice of the Peace. And, in each case, if the return day is on Monday, the last day of service will fall on the Monday week or fortnight preceding, accordingly. A writ from a Justice, however, must be served not less than seven nor more than sixty days before the return day. Rev. Stat. ch. 85, § 8.

In the case of the higher courts, it seems, a writ must be made returnable to the next succeeding term to which service can be legally made.

In actions against a county, town, precinct, parish, religious society, or school district, or against proprietors of common and

undivided lands, or of general fields, or of wharves lying in common, the writ must be served thirty days at least before the return day. Rev. Stat. ch. 90, § 22.

§ 2. *The mode of service.*

In actions against corporations, the service of the writ is to be made as follows : —

1. *Against a County.* An attested copy of the writ should be left with one of the County Commissioners, or with one of the officers who by law exercise their powers.

2. *Against towns, precincts, parishes, religious societies, school districts, proprietors of undivided lands, or general fields, or of wharves lying in common.* One attested copy of the writ should be left with the clerk of the corporation or proprietors, and another with one of the selectmen of the town, or one of the assessors or standing committee of the parish or religious society, or one of the proprietors of such land or other estate, as the case may be ; and if there is no such clerk found within the county, the copy of the summons so intended for him shall be left with one of the other officers before mentioned, or with one of the said proprietors ; and if there are no such officers, the copy so intended for them, respectively, shall be left with one of the inhabitants or members of the corporation.

3. *On other corporations.* The service may be made by leaving the original summons, or the copy, as the case may be, with the clerk, cashier, secretary, agent, or any other officer having charge of their business ; and if there be no such officer found within the county, the summons may be served on any member of the corporation.

4. *On individual defendants, or persons in general.* Whether the action is commenced by a writ of attachment, or an original summons with an order to attach property, a separate summons should be served on the defendant, *after the attachment.*

No person is liable to arrest on any contract made after July 4, 1834, without an affidavit by the plaintiff, or some one on his behalf, made before a Justice, that the plaintiff has a demand against the defendant on the cause of action stated in the writ, upon which he expects the plaintiff will recover ten dollars or upwards, and that the deponent has reasonable cause to believe that the defendant is about to depart beyond the jurisdiction of the court to which the writ is returnable, and not to return until after judgment may pro-

bably be recovered in the suit, so that he cannot be arrested on the first execution, if any, which may issue in such suit.

An original summons without an attachment, may be served by reading it or leaving an attested copy with the defendant, or the original or the attested copy, as the case may be, left at his dwelling-house or last and usual place of abode.

With regard to absent defendants, if the defendant is out of the State, but is an inhabitant of the State, the separate summons or the copy of the original summons may be left at his last and usual place of abode within the State; but if the defendant never was an inhabitant of the State, the service may be made by leaving the original or the copy, as the case may be, with his tenant, agent or attorney; and if there be none such known to the plaintiff or his attorney, the officer returns the facts and the court direct notice.

If the absent defendant is one of several joint contractors sued together, the copy may be left with one of the co-defendants, if the absent defendant has no tenant, agent, or attorney. If the defendant in a real action is out of the State, and has no known last and usual place of abode within it, the summons or copy, in addition to other service, must be left with the tenant or occupant of the demanded premises, if there be any; otherwise, left in some conspicuous place on the land.

In all cases where the defendant is out of the State, at the time of the service of the summons, he shall be entitled to further notice of the suit, as the court shall order.

If an action is brought by a person who has never been an inhabitant or cannot be found within the State to be served with process, he shall be held to answer in a cross action, and service on his attorney within the State, shall be sufficient.

For the further provisions of the law with regard to the service of writs, the attachment of real estate. &c., see the Rev. Stat.

By the Rev. Stat. ch. 14, § 97, coroners shall serve all writs and precepts, when the sheriff is a party or *interested* in the case.

Constables may serve writs, in personal actions, in which the damages shall not be laid at a greater sum than seventy dollars; and in cases where the sheriff or his deputy is a party, may serve a writ of replevin, where the property to be replevied or the damages shall not exceed seventy dollars.

If the sheriff is named in the writ as a party, a mere direction to the coroner to serve the writ, would seem sufficient. But, other-

wise, it should be alleged in the writ, that the sheriff is interested, in order to authorize a coroner to serve it. The omission will be a sufficient ground to quash the writ on mere motion, the defect being apparent on the record. But, if the defendant, instead of taking this course, or pleading in abatement, should plead to the action, he would be considered as admitting the jurisdiction, and waiving all exception to the writ, on account of the irregularity of the service. However, where it is alleged in the writ, that the sheriff is interested, the party defendant may appear and plead in abatement and traverse the allegation of the sheriff's interest, and take issue on that fact. See *Carlisle v. Weston*, 21 Pick. 535.

[See Rev. Stat. of Maine, ch. 114, § 26—104.]

CHAPTER XV.

OF ARRESTS.

Who are exempted from arrest.

It has been seen, that under the Rev. Stat. no person is liable to be arrested on mesne process, on any contract, made since July 4, 1834, unless the plaintiff, &c. shall make oath, &c. that the cause of action, &c. amounts to \$10 or upwards, and that he has good cause to believe that the defendant is about to depart from the State, &c.

Where a man's property has been attached, his body cannot be arrested on the same writ, and *vice versa* ; the former would be a trespass ; the latter, false imprisonment.

By the constitution of the United States, all Senators and Representatives of Congress, are exempted from arrest, except in cases of treason, felony and breach of the peace, during their attendance, &c. and going and returning to Congress.

By the constitution of Massachusetts, Representatives to the legislature are exempted from arrest on mesne process, going to, returning from, or attending General Court.

Under the Rev. Stat. of Massachusetts, no sheriff shall have his body arrested, either upon mesne process, or execution in a civil action.

[See Rev. Stat. of Maine, ch. 114 and 148.]

CHAPTER XVI.

OF ATTACHMENTS.

§ 1. *Of attachments of personal estate.*

Under ch. 90, § 56, Rev. Stat. of Massachusetts, where the writ is in the alternative, requiring the officer to take property or hold to bail, the plaintiff or his attorney, may by written or verbal instructions, direct the mode of service in this particular, with which the officer must comply, if practicable.

By section 110 of the same ch. the officer shall never be liable to an action for not arresting the defendant unless expressly required to do so, by the plaintiff or his attorney.

Whatever may be considered as comprehended under the words, goods and estate, the Legislature intended should be subject to attachment. This general rule however must be taken, with the exception of certain exemptions made from time to time by different statutes.

Under the Rev. Stat. the following articles are exempted from attachment.

1. The uniforms, arms, ammunition of officers and privates in the militia, are exempted from all suits for debts or taxes. Ch. 12, § 42.

2. The *necessary* wearing apparel of the debtor, his wife, and children; one bedstead, &c. for every two persons of the family; one iron stove, used for warming the house, fuel not exceeding \$10 in value; other household furniture not exceeding \$50. The bibles and school books used in the family. One cow, six sheep, one swine, and two tons of hay; the six sheep not exceeding \$30 in value. The tools and implements of the debtor's trade not exceeding \$50 in value. The rights of burial and tombs while in use as repositories of the dead.

By ch. 90, § 78, property mortgaged, may be attached in an action against the mortgagee, provided the attaching creditor shall pay or tender to the mortgagee, &c. the amount of his claim, within 24 hours after demand; if not so paid after demand in writing, the attachment is dissolved.

Under the former statute, 1805, ch. 100, instruments of husbandry were held not to be tools, and consequently might be attached. *Daily v. May*, 5 Mass. R. 313.

In *Howard v. Williams*, Mr. Justice *Lincoln*, states, "that the design and effect of the law are to secure handicraftsmen the means by which they are accustomed to obtain subsistence in their respective occupations. The exemption is not limited merely to the tools used by the tradesman *with his own hands*, but comprises such in character and amount, as are necessary to enable him to prosecute his appropriate business, in a convenient and usual manner," and consequently where apprentices or other assistants are necessary to carry on a business in a profitable manner, the tools necessary for them are exempted. 2 Pick. 80.

As the goods of a partnership are first liable to partnership debts, where the goods of a partnership were first attached at the suit of a creditor of *one* of the firm, and *afterwards* attached at the suit of a creditor of the firm, it was held, that the last attachment must prevail. 6 Mass. R. 242.

Where the debtor's goods are mixed with those of another, so that the officer cannot distinguish them, he may take the whole into possession, until notice and demand by the stranger, of his particular goods. *Bond v. Ward*, 7 Mass. R. 123.

In the same case, it was settled, that any goods, which cannot be returned in the same plight, cannot be attached, as hides in a vat. The rule of the English common law, on this subject, is, that goods which cannot be restored in *as good* plight, shall not be distrained, as crops growing on the tenant's land, or corn after it is cut. But by stat. 11 Geo. II. corn, grass, &c. or other product of the land may be distrained and cut and gathered, when ripe; and by 2 Will. & Mary, corn in sheaves, &c. or loose in the straw, or hay in a barn, or in ricks, may be distrained; and these two provisions seem to be adopted as law by our courts.

It was a rule of the English common law, that any thing in actual use could not be distrained, in order that breaches of the peace might not take place; and therefore an axe could not be taken out of a man's hand, or a horse from the rider, &c. See *Potter v. Hall*, 3 Pick. 368, and the authorities there cited. By the Rev. Stat. of Mass. ch. 90, § 24, all goods and chattels, that are liable to be taken in execution, may be attached and held as security as aforesaid, except such as from their nature or situation, have been considered as exempted from attachment, according to the principles of the common law, as adopted and practised in this State.

At common law, stocks and shares in incorporated companies, were not liable to distress, but in Massachusetts, they are made liable to attachment. See Rev. Stat. ch. 90, § 36.

By ch. 44, § 11, of the Rev. Stat. the franchise of any turnpike, or other corporation authorized to receive toll, and all the rights and privileges thereof, is made liable to attachment on mesne process. The attachment is made by leaving an attested copy of the process, and the officer's return thereon, with the clerk, treasurer, or one of the directors, fourteen days before the sitting of the court, &c.

By section 13, the mode of selling the franchise on execution, is pointed out, &c.

It has been made a question whether specie or bank bills are subject to attachment. With regard to specie, if a sum of money in a trunk, &c. is not attachable, what reason can be given for the exemption, more than for the exemption of any other personal effects? There is no species of property so little liable to be affected by attachment; none so little liable to depreciation; none that will so certainly secure the plaintiff's debt; none, where there is so little danger of taking an excessive distress; none that will suffer so little by being levied upon. But with regard to bank bills, the case is different. Bank bills, in strictness, are mere choses in action, and consequently, from analogy, are no more liable to attachment than other promissory notes, bills of exchange, &c. besides, as banks are liable to fail, and if the paper after attachment, should become of no value in the officer's hands, the debtor, without any fault or neglect, will suffer a loss, for which he can have no compensation, and which might not have fallen upon him, if there had been no attachment. But now, by the Rev. Stat. of Mass. ch. 97, § 20, current gold or silver coin may be taken in execution, and may be paid to the creditor as money collected.

Under the former stat. 1805, ch. 100, it was held, if a man's family consisted of himself and wife and three boys, two beds only are exempted from attachment. 15 Mass. R. 170. But where difference of sex renders the use of the same bed improper, if the family consist of such a number, three beds will be exempted, &c.

Under the same statute, it is settled that a swine, when butchered, though not cut up, is exempt from attachment. *Gibson v. Jenney*, 15 Mass. R. 205.

It is supposed that the same construction will be given to analagous clauses in the Revised Statutes.

Where a debtor has a number of cows, sheep or swine ; who shall elect which he shall retain ? It is obvious that humanity, the policy of the law, and the interests of creditors generally, are in favor of the debtor's election, though the interest of the creditor may be against it, in the particular case.

2. Of attachments of real estate.

The wife's real estate may be attached and taken in execution for her husband's debt ; but the levy must determine at his death ; or, if he is not entitled to hold as tenant by the courtesy, after his wife's decease, the levy must determine at her death. *See Divoll v. Leadbetter*, 4 Pick. 220.

And in general, by Rev. Stat. ch. 90, § 23, all real estates, that are liable to be taken in execution, may be attached and held as security, upon the original writ, in any action in which any debt or damages are recoverable.

By the Rev. Stat. ch. 73, § 1, all real estate, whether in possession, reversion or remainder, lands fraudulently conveyed with intent to defraud creditors, &c., rights of entry into land, rights of redeeming lands mortgaged, may be taken in execution.

By § 48, of the same statute, all rights of redeeming real estate that has been set off on execution may be taken and sold on another execution.

By section 49, the real estate of a deceased debtor, may be taken in execution, on a judgment recovered against his lawful executor or administrator.

By ch. 90, Rev. Stat. § 105, if an attachment is made, and the debtor dies before the goods or estate is taken on execution, the attachment shall be dissolved, if administration of the deceased's estate is granted within one year after his death, &c., otherwise the attachment remains good.

[*See Rev. Stat. of Maine, ch. 114 and 117.*]

CHAPTER XVII.

FOREIGN ATTACHMENT.

THE object of the process of foreign attachment is to enable a creditor, in order to obtain satisfaction of his debt, to avail himself

of debts due to his debtor from third persons, or of property so deposited in their hands, that it cannot be reached by attachment in the usual manner.

As the law will not intend that a trustee has been in any fault, it is one of the fundamental principles, with regard to this process, that the trustee or garnishee shall, in no respect, be in a worse situation than if the payment was to be made agreeably to the original contract, to the principal debtor, the garnishee's immediate creditor; the trouble of being compelled to attend court as trustee being considered too slight to deserve any other notice or compensation than the allowance of costs, which in such case, are taxed in his favor, whether adjudged trustee or not, if he discloses seasonably.

The Rev. Stat. of Mass. ch. 109, therefore authorizes the plaintiff, in certain actions, to summon persons indebted to the defendant to appear and answer under oath, whether they have any goods or effects in their hands belonging to the debtor, or are indebted to him, and to give him notice that such goods, effects, or credits are attached in their hands to respond the final judgment which the plaintiff may recover against the defendant in the same suit. That no prejudice may result to the garnishee from thus being placed in a situation which he probably did not contemplate when he made the contract with his creditor, the defendant, it is provided in the same ch. § 15, that the answers and statements sworn to by the garnishee, shall be considered as true, in deciding how far he is chargeable, but either party may allege and prove any other facts, not stated nor denied by him, that may be material in deciding that question.

From a regard to the security of the garnishee, it is also provided that no person shall be adjudged a trustee on account of any negotiable paper, to which he is a party. Because he might be put to great trouble, and perhaps suffer loss, if his creditor, the principal debtor, should negotiate the paper upon which he has been summoned as trustee.

For the same reason, it is held by the courts, that no one should be held as trustee, in any case, where he could not avail himself of the payment which he might make, as trustee, to the principal creditor, in any suit then pending, or which might afterwards be brought by the principal debtor, his own creditor.

These rules and principles being established as a foundation, it remains to consider: 1. In what actions recourse may be had to this

process, under the statutes of this Commonwealth; 2. What debts or property is subject to it; 3. Who may or may not be held as trustees.

§ 1. *In what actions recourse may be had to this process.*

By ch. 109, Rev. Stat. of Mass., § 1, all personal actions, brought either in the Court of Common Pleas, or the Supreme Judicial Court, may be commenced by process of foreign attachment, except replevin, case of malicious prosecution, or slander, and trespass for assault and battery.

§ 2. *What debts or property is subject to this process.*

The general rule is prescribed in chap. 109, Rev. Stat. § 4, that every person having any goods, effects, or credits, entrusted in his hands or possession, may be summoned as a trustee; and such goods, effects, and credits, shall be thereby attached and held to respond the final judgment in the suit, in like manner as goods or estate when attached by the ordinary process.

Where a mortgagee of goods is summoned as trustee of goods in his possession, the attaching creditor, under an order of court for that purpose, may be allowed to pay or tender the amount due the trustee, and the trustee shall thereupon deliver the goods to the officer who holds the execution. Ch. 109, § 25.

A debt not yet payable, but due without contingency, may be attached. Ch. 109, § 34.

A person in possession of any goods, effects, or credits of the debtor, by a title or conveyance, void as to creditors, will be held as a trustee, though the debtor himself could maintain no action against him. Ch. 109, § 35.

A debt or legacy, or other goods, effects, or credits of the principal debtor, may be attached in the hands of an executor or administrator. Ch. 109, § 62.

Under the same chapter, § 2, it is held, that the interest of an heir at law, in a distributive share of an intestate, in the hands of an administrator, is subject to the trustee process *before a decree of distribution*, and while it is uncertain whether there will remain any assets for distribution. *Wheeler v. Bowen & trustee*, 20 Pick. 563.

So the interest of a husband in the wife's distributive share, is subject to the process of foreign attachment, in the hands of the administrator, at the suit of a creditor of the husband. *Ibid.* And each creditor has the same right that the husband has, of defeating

the wife's right of survivorship. This is a great hardship on the wife, however, and seems worthy of legislative consideration.

§ 3. *Who may or may not be held as trustees.*

A party to a negotiable security, whether drawer, maker, acceptor, or indorser, shall not be held as trustee, on account of the money due on it. Rev. Stat. ch. 109, § 30.

A sheriff, or other officer, shall not be held as trustee, on account of money collected, or goods received by him, on an execution in favor of the principal debtor, even though after demand made by him on the officer. *Ibid.*

A public officer shall not be held as trustee on account of money for which he is accountable, as a public officer, to the principal defendant. *Ibid.*

A person shall not be liable as trustee, on account of a debt, unless, at the time of service of the process, it was due absolutely, and not on a contingency; (*debitum in presenti, solvendum in futuro.*) *Ibid.*

A person shall not be liable, as trustee, on account of a judgment against him in favor of the principal defendant, so long as he is liable to an execution on the judgment.

By ch. 109, § 6, all corporations may be summoned as trustees, and shall answer by their cashier, treasurer, &c.

By § 31 of the same chapter of the Rev. Stat. the defendant in any action, may be summoned as a trustee of the plaintiff in that action, before final judgment. The true construction of the phrase, "any action," however, does not seem clear. But it may be inferred, that it was not the intention of the legislature, that after an action had been commenced on a demand, on which the defendant would not have been previously liable to be summoned as trustee, he should become liable to the process of foreign attachment, by the act of instituting a suit against him by the principal debtor.

The promisor in a contract not negotiable, may be held as the trustee of the promisee before assignment of it. But after an assignment with notice to the promisor, the promisor, if he discloses the assignment, must be discharged. See 2 Mass. R. 524; 4 Mass. R. 450.

Where A's debtor has made an express promise to A's factor, to pay *him* the amount, he cannot be held as the trustee of A, lest he should be twice charged. 4 Mass. R. 259.

Where A promises to perform *labor* for B to a certain amount, A cannot be held as trustee of B, until after breach of the promise. 4 Mass. R. 170; 4 T. Rep. 102. *Otherwise*, of a contract to pay money or deliver goods, by a contract not negotiable, unless actually assigned with notice to the promisor.

Consignees of goods, after delivery of the goods, may be held as trustees for the freight, even after payment to the owners, with an agreement to refund in case the owners were not entitled to it. Because the master has a lien on the freight, even against the owners themselves. 11 Mass. R. 72.

Where there is a covenant to pay rent, the covenantor cannot be held as the trustee of the covenantee, until the rent has become due. The rent may never become due. *Wood v. Partridge*, 11 Mass. R. 488.

A person may be held as trustee, on account of property deposited in his hands, though such property is not liable to be attached at that time; thus a tanner may be held as trustee of a person who has deposited hides with him to be tanned, though, while the hides are under the process of tanning, they are not subject to attachment. *Clark v. Brown & trustee*, 14 Mass. R. 271.

An attorney may be held as trustee of his client, for money collected. 12 Mass. R. 141.

An auctioneer, who has sold goods for a sheriff, cannot be held as trustee for the proceeds, but is accountable to the sheriff only. 6 Mass. R. 116.

A, having moneys of B, C, and D, cannot be held as trustee of C, D, and E. 9 Mass. R. 490.

An agent of a foreign Insurance Company, is not a trustee for the amount of a loss sustained by the insured. 8 Mass. R. 504.

A, being indebted to B, gives him a deed of real estate as security; B sells the land for more than the amount of the debt; he may be held as trustee of A, for the balance; but he cannot be held as trustee until the land is sold. 3 Mass. R. 564.

The grantee in a fraudulent conveyance does not thereby become the trustee of the grantor. 5 Mass. R. 391. Because the conveyance is void, and the land itself may be levied upon.

Where a debtor holds a joint contract against two or more, and his creditor would avail himself of the benefit of this contract under a foreign attachment, he must summon all the parties, liable by

law to discharge it. *See the opinion of Parsons C. J. in Jewett v. Bacon*, 6 Mass. R. 62.

Where a creditor of one of the partners of a copartnership is desirous by this process to appropriate to the payment of his debt, a debt due to the partnership, he ought, beside the partnership debtor, to summon one of the partners as trustee; and if on the examination of such partner, it should appear that the principal debtor has an interest in the partnership effects, after their debts are all paid, that interest may be secured by foreign attachment. 6 Mass. R. 271.

A person summoned as trustee on account of specific articles in his possession, is entitled to retain the possession of them against an officer, who attempts to attach and remove them specifically, and, if they are taken from his possession, may maintain trespass against the officer for taking and carrying away the goods. *Rockwood v. Varman*, 17 Pick. 289.

But, it seems, such trustee is under no obligation to commence an action against the officer, unless he is indemnified for so doing. *Ibid.* And by what right can he be compelled to commence a suit, if indemnity should be offered to him? It would seem sufficient, if he were willing to authorize the party injured to prosecute at his own risk and for his own benefit.

Where it appears, from the answer of the trustee, that he is answerable for *some* amount, he will be charged as trustee, and the amount will be determined on *scire facias*, if the trustee does not pay over as much as the creditor thinks him bound to pay. *Winchester v. Titcomb & trustees*, 17 Pick. 435.

The manner of serving the trustee process is particularly pointed out in chap. 109, Rev. Stat. of Mass.; also ch. 210, stat. of 1837.

A trustee writ may be abated as to the trustees, for defective service as to them, and yet remain good as respects the principal debtor, it being settled that it shall not be abated as to the principal, on the ground of a defect in the service upon the trustee. *Thayer v. Ray*, 17 Pick. 166.

In such case, the trustee may plead in abatement, in his own name, without answering. *Ibid.*

Where an inhabitant of Massachusetts commenced an action against an inhabitant of Rhode Island, and his trustee, a transient person within the Commonwealth, and no other attachment was made than that of the debt due from the garnishee to the principal debtor, the court dismissed the action on motion of the counsel of the principal debtor, the garnishee disclosing that he was an inhabitant of another State. *Nye v. Liscombe & trustees*, 21 Pick. 263.

Under ch. 109, § 7, of the Rev. Stat. of Mass., "if all the persons, named in the writ as trustees, dwell in one county, the writ shall be returnable in that county; otherwise, it may be returnable in any county in which either of the trustees dwells, without regard to the domicil of the principal parties.

[See *Rev. Stat. of Maine*, ch. 119.]

PRECEDENTS OF DECLARATIONS.

ACCOUNT.

[By ch. 118, § 43, of the Rev. Stat. of Massachusetts, the action of account is abolished. Where the nature of an account is such that it cannot be conveniently adjusted in an action of Assumpsit a bill of equity may be brought. See 12 Mass. R. 152.]

ACCOUNT is the proper action to be brought, whenever a man by reason of his office, as executor, administrator, or guardian; or, on account of any sums of money he has received, on behalf of another; or, on account of any business he has undertaken for another, as the management of his lands, or the disposal and sale of his merchandize; has become liable to render an account.

It is also the proper action to be brought by one partner in trade, or part owner of a chattel, against another, for an account of profits. So also it is a proper remedy for one joint-tenant, or tenant in common, against another, who has received more than his share of the profits.

So if A makes a bailment to B, to deliver to C; and B does not deliver, A may maintain account against B. 2 Lev. 31. But C can only maintain trover or replevin.

In order to maintain this action, there must be a privity between the parties, being grounded on a contract, and all the contracting parties must join and be joined. It cannot be brought against one, who has given security for the property entrusted to him, of which an account is required; nor against a mere servant to whom the custody of property is delivered; nor against a minor, nor an apprentice, as such; nor against a disseizor, or other wrongdoer, between whom and the plaintiff no privity exists. Against one *as bailiff*, it does not lie for any ascertained sum of money, but only for uncertain damages. Thus against a bailiff it will lie for the profits of a *certain* sum of money, or quantities of goods, but not for the sum itself, or the precise goods; for the precise sum of money he should be charged as receiver. But if any one should take the profits of

my lands, I may waive the tort, and bring account against him, and charge him as *receiver* or *bailiff*; or, if I am an infant under fourteen years of age, I may bring account against him as *guardian*. Fitz. N. B. 117, 118.

Account will not lie for rent on a lease, but only covenant or debt; nor against a bailee of goods to deliver over to a third person, can account be maintained by such person, but only detinue, trover, or replevin. But where one has covenanted by deed to account, account may be maintained against him as well as covenant. 1 Rol. 116; L. 20, 27.

With regard to the parties, an executor or administrator, or a survivor of two or more, may sue an executor or administrator, &c. according to the circumstances of each case. If A, B, and C are joint-tenants, tenants in common, or co-parceners, and A receives all the profits, *without any express agreement to that effect between all of them*, B may maintain account against A without joining C. See 2 Cro. 210.

An executor cannot maintain Account against his co-executor. Com. Dig. Accompt (D.)

Of the Declaration in Account.

The plaintiff, in his declaration, must take care to charge the defendant properly, as *bailiff*, *receiver*, or *guardian*, according to the fact. 2 Bul. 277.

A *bailiff* hath the charge of lands, goods, or chattels, to make the best benefit thereof, for the owner.

A *receiver* is one who has received money, and is to account for it. A *bailiff* is answerable for the profits he might have made; a *receiver* for the precise sum or goods only. A *bailiff*, as well as a *guardian*, is to be allowed his disbursements and reasonable charges; and a *bailiff*, *receiver*, or *guardian*, shall be allowed whatever is lost by inevitable accident. A *receiver* is allowed nothing for his expenses, but what was agreed between the parties.

In declaring against one as *bailiff*, it is unnecessary to state from whom he received the money. But in declaring against one as *receiver*, it is necessary to state by whose hands he received. Co. Litt. 172, a.; 3 Keb. 425. However, the omission is only matter of form, and is aided by the judgment to account. 2 Lev. 126. But it is not necessary to be particular with regard to the precise time, or the exact amount of the money. *Ibid.*

A *bailiff* cannot properly be charged as *receiver*; nor a *receiver*, as *bailiff*; since their accountability and the allowances to be made them are different. 1 Rol. 119.

On the first judgment to account, the defendant should be sworn to account well and lawfully. Br. Account, Pl. 10; Imp. Pl. 154.

The following precedents in account, by the allegation of a promise to render a reasonable account on demand, may easily be altered to *assumpsit*. See declarations in *assumpsit* in the nature of account; *post*.

Of Proceedings before Auditors.

After the interlocutory judgment to account, auditors are appointed whose sole business is to adjust the accounts between the parties. For this purpose, the parties themselves are admitted as witnesses to their accounts. The report of the auditors, if not objected to by the parties, will be considered as conclusive of the balance struck; but their report may be objected to, either on account of any mistake of the law; or any improper admission or rejection of evidence; or because they have taken into consideration matters not submitted to them. 2 Day's Rep. 116. So also for corruption or partiality.

DECLARATIONS IN ACCOUNT.

Adm'r v. Bailiff and Receiver.

IN a plea of account; for that the said D, at &c., from &c., to &c., was the bailiff and receiver of the said S [*intestate*], he being all that time living, during which time the said D received, of the monyes of the said S, at &c., from &c., to &c., aforesaid, all the several sums of money, mentioned in the schedule annexed, amounting to &c., to merchandise with, and make profits thereof, and to render a reasonable account thereof to the said S on demand; yet the said D, though often requested, never rendered such reasonable account to the said S in his lifetime, nor since his decease, to the plaintiff, though requested, but still neglects to do it. *Martin adm'r v. Thompson.* JONA. FAY.

Ex'r of Partner v. One of Surviving Partners, as bailiff of goods, &c.

In a plea of account; for that the said D was bailiff to the said S [*intestate*], however and from whatever cause and contract arising, for the common use and benefit of the said S, the said D, and one W. P., from &c. to &c. at &c., of certain merchandise of the said S, to wit, of the third part of thirty-eight tuns of wine, &c., of the value of &c., which merchandise the said S, the said D, and W. P., in the life of said S, had occupied for their common use and benefit; and the same, during the time aforesaid, were entrusted to the hands of the said D, by the assent of the said S and W. P., to merchandise for their common profit; and the said D thereof to render his reasonable account to the said S when thereto requested; yet &c. *as before.*

NOTE. In a count similar to this, judgment was attempted to be arrested, because the plaintiff had declared against D as a *general* bailiff; whereas it appeared, that he was a special one; for it is between merchants and tenants in common; and because the plaintiff has declared for a third part, when he ought to have declared for the whole; and because W. P. ought to have been joined. But the objections were overruled; for the plaintiff might sue, though his companion would not; and it may be, he committed only his third part to the defendant. 2 Cro. 410, *Hackwell et ux. v. Eastman*; 1 Ld. Ray. 340. (MSS.)

By one tenant in common against another as his bailiff.

In a plea of account; for that whereas the said D, on &c., and from thence continually until &c., was bailiff of the plaintiff for a certain farm, situate, lying, and being, &c. and during all that time, receiving the issues thereof and whereof the said plaintiff and the said D were seized undividedly, as tenants in common, viz. the said plaintiff of one undivided moiety thereof, and the said D of the other moiety; to the common profit of the said plaintiff and the said D, and to render a reasonable account thereof to the plaintiff when thereto requested; yet, though requested, &c. 1 Went. 83.

Against bailiff, for not rendering account of goods delivered to merchandise with.

In a plea of account; for that whereas the said D, at &c. had been bailiff to the plaintiff, from the &c. day of &c., to the &c. day of &c., and, during all that time had the care and management of divers goods and chattels of the plaintiff, to wit, one half of the Snow, called &c., with all her tackle, apparel, furniture, and appurtenances, of the value of &c., also one half of the sloop, called &c., with all her tackle &c., of the value of &c., and also one half of the cargo of said sloop, consisting of divers goods and merchandises; to wit, &c. of the value of &c., to merchandise and make profit thereof for the plaintiff; and thereof to render the plaintiff, the said D's reasonable account on demand; yet the said D, though requested, hath not rendered his reasonable account thereof, but neglects so to do.

Another.

In a plea of account; for that the said D, at &c., had been bailiff to the plaintiff, from the &c. day of &c.,

to the &c. day of &c., and, during that time, had the care and management of the goods of the plaintiff (in the schedule hereto annexed, mentioned); all of the value of &c., to merchandise and make profit thereof, for the plaintiff; and to render him a reasonable account thereof on demand; yet, though requested, the said D hath never rendered a reasonable account thereof, but wholly refuses so to do. J. OTIS.

Another.

In a plea of account; for that the said D, at &c. on &c., was bailiff to the plaintiff of twenty pair of men's shoes &c., all of the value of &c., to carry them to the West Indies, the dangers of the seas excepted, and there to merchandise with them to the plaintiff's best profit, and thereof to render the plaintiff his reasonable account, on demand, saving to the said D one half of the profits thereof; and the said D afterwards carried the said goods safe to &c., in the West Indies; yet he hath not rendered his reasonable account thereof, though requested, but unjustly neglects it. GRIDLEY.

Another by Baron and Feme.

In a plea of account; for that the said D, at &c. from &c. to &c., was the bailiff of the said F, then sole, and during all that time, had the care and management of the several goods and chattels, enumerated in the schedule hereunto annexed, all of the value of &c., to merchandise therewith, for the benefit of the said F, and ought thereof to render his reasonable account on demand; yet the said D, though often requested, never rendered his reasonable account aforesaid, to the said F, while sole, nor to the plaintiffs or either of them, since their intermarriage, but refuses to do it. THATCHER.

By consignor of goods.

In a plea of account, for that the said D at &c., from &c. to &c., was the plaintiff's bailiff, and in that time, had the care and management of the plaintiff's five hogsheads of molasses, containing &c., of the value of &c., to transport to Philadelphia (the dangers of the seas only excepted), and there to sell the same to the plaintiff's best advantage, and to lay out the proceeds in

the following manner, viz. &c., and to render to the plaintiff a reasonable account thereof, when thereto required; and the plaintiff avers, that the said D transported the goods aforesaid safely to said Philadelphia, and there sold the same; yet, though requested, &c.

Against surviving bailiff, for not rendering account of goods, &c.

In a plea of account; for that the said D and one S. now deceased, and whom the said D survived, were, for a long time, to wit, from &c. to &c., the bailiffs of the plaintiff, to wit, at &c., and during that time, had the care and administration of divers goods and merchandises of the plaintiff, to wit, of twelve chests of coral beads of the plaintiff, of a great value, to wit, forty thousand dollars, to be merchandised and made profit of for the plaintiff, and to render a reasonable account of the same to the plaintiff, when requested; yet the said D and S, in the lifetime of the said S, or the said D, since the decease of the said S, though often required, have not nor hath either of them, rendered a reasonable account of the same to the plaintiff, but the said D and S, in the lifetime of the said S, and the said D since the decease of the said S, have refused, and the said D still refuses so to do. *Godfrey v. Saunders*, 3 Wilson's Rep. 73.

Partner v. Partners, as bailiffs of lands and goods.

In a plea of account; for that the said C and D, on &c., and from thenceforth until &c., at &c., were bailiffs of the plaintiff of certain closes, called &c., situate in &c., with the appurtenances, of them, the said C and D and the plaintiff, and, for all that time had the care and management thereof, and received the issues and profits thereof, *for the common benefit and profit of the said C and D, and the plaintiff*, to render a reasonable account thereof to the plaintiff, when thereto required; and, during all that time, at &c., were the bailiffs of the plaintiff, and had the care and management of great quantities of peat, and peat ashes, and hay of the said C and D and the plaintiff, *for the common benefit and profit of the said C and D and the plaintiff*, to render a reasonable account thereof to the plaintiff, when thereto required; yet the said C and D, though often requested, have not, nor hath either of them, rendered to the plaintiff

a reasonable account of the premises, or any part thereof, but have denied, and still deny so to do.

Pl. Assist. 35. HARDCASTLE.

Against bailiff for goods, &c. to merchandize with.

In a plea of account; for that the said D had been bailiff of the plaintiff, from &c. until &c., and during all the time aforesaid, had the care and disposal of divers goods and merchandizes of the plaintiff, to wit, of six half barrels of white herrings, four quarter barrels of salmon, and one half barrel of salmon for all the time aforesaid, to merchandize and make profit thereof, for the plaintiff, and to render him a reasonable account thereof, when requested; yet the said D. though requested, hath not rendered a reasonable account thereof, but hath refused, and still refuses to render the same to him.

Pl. Assist. 36. DRAPER.

Against owner of fishing schooner, for not accounting for fish.

In a plea of account; for that the said D, was bailiff of the plaintiff, at &c., from &c., to &c., and had the care and management of his fifth part of one hundred quintals of cod fish, caught by the plaintiff and others, a fishing crew in the said D's schooner, Fishhawk, within the time aforesaid, and of the value of &c., to merchandize with, and make profit thereof, for and to render his reasonable account thereof, to the plaintiff on demand; yet, &c.

Joint-tenant v. Joint-tenant of a chattel, as bailiff.

In a plea of account; for that the said D, for a long time, to wit, from &c., until &c. at &c., was proprietor of one undivided moiety, and bailiff of the plaintiff of the other undivided moiety, of a certain mare, and during that time, had the care and management of said mare, and the letting out to hire of said mare, for the advantage and profit of the plaintiff and the said D, to render a reasonable account thereof to the plaintiff, on demand; yet the said D, though requested, hath not rendered the said reasonable account to the plaintiff, but refuses so to do.

Imp. Pl. 153.

NOTE. This action is given by 4 Ann, c. 16, sect. 27, in England.

Against Bailiff of lands and chattels, and receiver of money, to merchandise.

In a plea of account; for that the said D, on &c., and until, &c., at &c., had been bailiff of the plaintiff, of twenty messuages and five hundred acres of land, with their appurtenances, and during all that time, had the care and management of the horses, cows, and sheep of the plaintiff, to wit, of fifty horses, fifty cows, and five hundred sheep, to make merchandise and profit thereof, for the plaintiff, and to render the plaintiff a reasonable account of the same; and, during the time aforesaid, that the said D had been bailiff to the plaintiff, at &c., the said D, at &c., received of the money of the plaintiff, ten thousand dollars, by the hands of R. S., to make merchandise and profit thereof, for, and to render a reasonable account thereof to the plaintiff, when requested; yet the said D, though requested, hath not rendered a reasonable account thereof to the plaintiff, but hath refused, and still refuses so to do. *Imp. Pl. 151.*

Against bailiff of lands, with power to demise, &c., and receiver of moneys.

In a plea of account; for that the said D was bailiff to the plaintiff of one messuage and thirty acres of land with the appurtenances, in S aforesaid, from &c. to &c. and during all that time, had the care and management thereof, and sufficient power to improve, let, and demise the tenements aforesaid, with the appurtenances, and to collect and receive the rents, issues and profits of all the premises, to the use of the plaintiff, and, during all that time, had been receiver of all the moneys of the plaintiff, and had as such received of the moneys of the plaintiff, by the hands of R. W. one hundred dollars, and, by the hands of W. R., six hundred dollars, to render his reasonable account thereof, to the plaintiff, on demand; yet the said D, hath not rendered his reasonable account thereof to the plaintiff, but hath refused, and still refuses so to do.

Mod. Ent. 50.

Against a guardian for profits of lands.

In a plea of account; for that the said D had been guardian to the plaintiff, and, as such, had the custody of the lands and tenements of the plaintiff, to wit, two messuages, three cottages, and eighty acres of land,

thirty acres of meadow, eighty acres of pasture, and thirty acres of wood, with the appurtenances, in &c., from &c. until &c., (the plaintiff during all that time being within the age of fourteen years,) and, during all that time, the said D received the issues and profits of the said messuages and tenements, to render his account thereof when he should come of full age; yet the said D hath not rendered such account to the plaintiff, but hath refused, and still refuses so to do. *Mod. Ent. 52.*

NOTE. By "full age" here is meant fourteen years; and if the guardian take the profits afterwards, he must be sued as bailiff, and not as guardian; and this may be done, even while under twenty-one years of age. 1 Inst. 89; 1 Woodes. 457; 1 Bl. Comm. 463.

So if a stranger intermeddle with, and take profits of the lands, the heir may have this action against him, and charge him, as guardian, for the time he was under fourteen; and, as bailiff, afterwards. Fitz. Nat. Brev. 270; Sulliv. Lect. 175; Co. Litt. 89, b. 90, a. (MSS.)

Adm'r of a partner against a partner, who was also surviving partner of another firm, as receivers of moneys.

FIRST COUNT. In a plea of account; for that the said S [*intestate*] and one C, now deceased, had the said E, at &c., on &c., and long before had been, and from that time until the decease of the said C, which happened on &c., continued to be copartners in trade, jointly using commerce together under the name and firm of &c., and the said E and one A, on &c., and long before that time, were, and until the time of the decease of said A, which happened on &c., continued to be copartners in trade, jointly using commerce together, as partners, under the firm of &c., to wit, at &c.; and that the said E and A, being partners as aforesaid, in the lifetime of said A, were the receivers of the moneys of the said C, S, and E, from &c., unto the time of the said A's decease, which happened on &c., during which time the said A and E in his lifetime, as partners as aforesaid, had jointly received of the moneys of the said C, S, and E, belonging to them as copartners, as aforesaid, at &c., the several and respective sums, mentioned in the account hereto annexed, by the several persons, for the causes, in the way and in the manner, respectively mentioned in said account, in the whole amounting to \$60,300, one third part whereof belonged to the said S, to render a reasonable account thereof to him, when they, the said A and

E, should be thereto requested ; yet the said A and E, in the lifetime of the said A, although often requested, or the said E, after the decease of the said A, never rendered such reasonable account to the said S, in his lifetime, or since the decease of the said S to the plaintiff, although often requested, but the said E still neglects and refuses so to do.

Against the same, as bailiff of lands, &c.

SECOND COUNT. And also, for that the said E and A, in his lifetime, to wit, on &c., and from thenceforth until &c., at &c., were bailiffs of the said S, in his lifetime, of the several messuages, buildings, parts of buildings, lots and tracts of land, and parcels of real estate, mentioned in the schedule hereto annexed, with the appurtenances, of them the said S, E, and C, now deceased ; and for all that time had the care and management thereof, and received the issues and profits thereof, for the common benefit and profit of the said S, E, and C, during his life, and, after his decease, for the common benefit and profit of the said S and E. and the executors of the testament of the said C, to render a reasonable account thereof to the said S, when they should be thereto required ; yet, &c. *as before.* **Essex S. J. C., 1797. Putnam, adm'r v. Hussey. S. PUTNAM.**

Partner v. Partner, as receiver.

In a plea of account ; for that the said B, at &c., was the receiver of the moneys of the plaintiff, from &c. to &c., *however and by whatever contract accruing, for the common use, benefit, and profit of them, the said D and the plaintiff,* and, during that time, received of the plaintiff's money, at &c., by the hands of A. H. \$1000, to merchandize with, and to make profit thereof for them, the said B and the plaintiff, and thereof to render the plaintiff a reasonable account on demand ; yet, though requested, the said B hath not rendered a reasonable account thereof, but wholly refuses so to do. **Rast. Ent. 19. S. SEWALL.**

NOTE. The general rule is, that, where the plaintiff declares against one, as receiver, he must specify by whose hands the moneys were received ; but, in the case of merchant partners, the rule is dispensed with, and the declaration only states the money received to the common profit, &c. **F. N. B. 117, D ; Co. Litt. 172. (MSS.)**

ASSUMPSIT.

ASSUMPSIT is the proper remedy to recover damages, for the breach or non-fulfilment of any contract, express or implied, written or unwritten, if not grounded on an instrument under seal; and "wherever a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. Per Lord Mansfield in *Hawkes v. Saunders*, Cowp. 290.

Where Assumpsit lies.

It lies to recover back money, paid by mistake, either of *fact* or in law, money, obtained by imposition, fraud, extortion, oppression, or any undue advantage taken of plaintiff's situation; or, for money paid for a consideration that happens to fail, or on a contract, which is rescinded. 1 Term. R. 133; 2 Esp. R. 639. But assumpsit does not lie to recover back money paid by plaintiff and claimed of him, as payable in point of honor and honesty, though not recoverable by law; as a debt, barred by the statute of limitations or contracted during infancy, or to the extent of principal and legal interest on an usurious contract, or for money fairly lost at play; for, in such cases defendant may retain, though he cannot recover by law. Cowp. 94; 1 T. R. 286.

But now, by ch. 50, § 12, of the Rev. Stat., money lost at play, may be recovered back, in an action of assumpsit, for *money had and received*; and goods lost at play may be recovered back in an *action of trover*; or, a *special action on the case* may be maintained. If the loser does not commence such action within three months, any other person may commence an action, and recover the treble value of the money or goods in an *action of Debt*.

By § 13, *wager of law* is allowed between the loser and winner, in an action brought by the loser, at the plaintiff's election.

Assumpsit lies for a penalty forfeited upon a by-law. 2 Lev. 252. *The Barber Surgeons of London v. Pelson*.

It lies upon an express promise to pay a debt upon a specialty, upon a new consideration; as forbearance. *Britt v. Read*, Cro. Car. 250; *Ashbrook v. Shape*, Cro. El. 240. And though, generally, Assumpsit cannot be maintained for rent due on a lease, if there is an express promise, it will lie. *Johnson v. May*, 3 Lev. 150. Where goods, under a warrant of distress on a conviction, are taken and sold, and the conviction is quashed, the owner may waive the tort, and bring Assumpsit for money had and received to his use. *Lindon v. Hooper*, Cowp. 419; 1 T. Rep. 387, in *Birch v. Wright*.

So where A's goods have been taken in execution for a third person's debt, A may maintain an action for money had and received. *Ibid*.

Assumpsit is likewise a proper remedy to recover money due for freight; to recover a legacy; to recover money awarded by arbitrators; to recover back money of which one has been cheated or defrauded, to recover back money paid in consequence of any contract, &c. made illegal and void by statute, if the plaintiff is not *particeps criminis*; to recover an assessment legally made, or a forfeiture incurred by a breach of a by-law of a society; so for tolls; for fees; or any other charges for the performance of any act required by one's office, and allowed by law; to recover back money paid to one acting under a void authority. 1 Salk. 22.

By ch. 118, § 42, Rev. Stat. fines and forfeitures may be recovered in an *action of Debt*, or, *on the case*, where there is no express provision made for the mode of recovering them. So, if they are made recoverable by bill, plaint or information, they may be recovered by an action of debt, or on the case.

So where a judgment is reversed for error, Assumpsit may be maintained for money paid under it.

Assumpsit may be maintained against a corporation on an implied promise. 14 Johns. 118.

It may be maintained for the price of land sold; and the acknowledgment of payment in the deed is not conclusive that it has been paid. 14 Johns. 210.

Where Assumpsit does not lie.

Where a man pays a forged bill of exchange drawn on him, Assumpsit does not lie against an indorsee, who has acted fairly, to recover the money back. M. 3; G. 3; B. M. 1354.

If A pay money to B to bribe officers, which is paid accordingly, Assumpsit cannot be maintained against B. 1 Salk. 22, *Tompkins v. Bennet*.

But Assumpsit will not lie to recover back money paid into court, though paid wrongfully.

Where two are partners in any unlawful undertaking, and one receives money on that account, the other cannot maintain Assumpsit for a share.

Assumpsit will not lie between partners in trade, without an *express* promise.

If A Pays B a sum of money to avoid a suit, in which he might have a good defence, and states at the time, that he does it without prejudice to his right, yet he cannot maintain Assumpsit to recover it back; as to allow it, would lead to circuity of action; since any matter which would enable him to recover back the money paid, would be a good defence to the former action. 1 Esp. N. P. C. 84, 279; 2 E. N. P. C. 546.

If a creditor in payment of his debt, receives a note or bill of a third person payable at a future day, he cannot commence an action on the original debt, until after the day of payment of the bill or note is elapsed. But if the bill or note was of no value when given, as if the bill was drawn on a person having no funds of the

drawer, the creditor might consider it a nullity, and commence a suit on the original debt immediately. *Stedman v. Gooch*, 1 Esp. R. 3.

Where a creditor takes a note of a third person in payment of his debt, such third person before payment of the note, and before the time of payment elapsed, may recover against the debtor on a count for money paid to his use. 2 Esp. R. 571.

Assumpsit cannot be maintained upon a mere casual speaking, which, being without any good consideration, can be nothing more than *nudum pactum*, and assumpsit can never be maintained on a promise not grounded on a good consideration. 2 Lev. 30.

If A requests B to do an act, which B *knows to be a trespass*, and promises B an indemnity, Assumpsit cannot be maintained against A. since the promise is absolutely void. But if B does not know the act to be a trespass, the promise is binding. 17 Johns. 142.

Where an infant and another make a joint promise, and the infant avoids his promise, the joint promisor may be sued alone, and if he pleads in abatement that there is a joint promisor not named, the plaintiff may reply the special matter. See *Gibbs v. Merrill*, 3 Taunt. 307.

An action of Assumpsit cannot be maintained to recover the value of a parcel of prints of a libellous or indecent nature. *Fores v. Johns*, 4 Esp. R. 98.

Of considerations, nudum pactum, &c.

The possibility of a benefit to the defendant, or detriment to the plaintiff, or a suspension or forbearance of right on the plaintiff's part, is a sufficient consideration for an express promise. But forbearance where there was no right of action, is no consideration. *Loyd v. Lee*, Str. 94; 1 Show. 183.

A mere moral obligation, which cannot be enforced at law, is not a sufficient consideration for an *implied* promise. But if there is an *express* promise, it is a good consideration, and not merely *nudum pactum*. 2 East, 505; *Atkins v. Banwell*, Cowper's R. 290. See *Mills v. Wyman*, 3 Pick. 207. See also *Littlefield v. Shee*, 2 Barn. & Ald. where this doctrine is qualified.

One promise is a sufficient consideration for another between the same persons, and therefore mutual promises are grounded on a sufficient consideration. 1 Sid. 180.

Thus A promises to marry B; and B promises to marry A; the consideration is sufficient.

Natural love and affection are not sufficient to ground an Assumpsit. Cro. Eliz. 756. A good consideration must be either a damage to the plaintiff, or a benefit to the defendant.

An *executed* consideration, done at the request of the defendant, is sufficient. *Hayes v. Warren*, 2 Strange, 933.

If A and B make an agreement, which for want of some formality is not binding, and B goes on and performs his part, and A

agrees to pay him, this promise binds A. See *Seago v. Deane*, 4 Bing. 459.

A agrees to sell B goods, if B will agree to take them and give A notice by 2 o'clock; B gives A notice, at the time; yet it is held B can maintain no action for the goods, because it is merely *nudum pactum*. See *Cook v. Oxley*, 3 T. R. 653.

A conveys real estate to B, and B gives a note to A for the consideration; but the title to the real estate fails, and nothing passes by the deed; A cannot recover on the note, the consideration having failed. See *Dickenson v. Hall*, 14 Pick. 217; *Rice v. Goddard*, 14 Pick. 293. On the contrary, it would seem, in such case, if B had actually paid the note, he would be entitled to recover it back against A.

But, if A contracts with B to convey to B land, then belonging to C, and B assigns his interest in that contract to D, for which D gives him a promissory note, it seems the note may be enforced by B in an action against D. See *Trask v. Vinson*, 20 Pick. 105.

The law of considerations legal and illegal, good and void is examined at length, Law Summary, p. 21, (2d ed.)

Of setting out the consideration, &c. in the Declaration.

1. If a good consideration and a *frivolous* one are both alleged, and the good one alone is proved, the plaintiff may recover.

2. If two *good* considerations are alleged, and one only is proved, the plaintiff cannot recover. See *Brown v. London*, 1 Lev. 298; Cro. Eliz. 146. So if one is *illegal*, the plaintiff cannot recover on the other.

3. Where a promise is grounded on two considerations, and the plaintiff declares only on one, he cannot have judgment; it is ground for a nonsuit.

It is immaterial from whom a consideration passes, if it is a sufficient foundation for a valid promise. See *Cabot et al. v. Haskins*, 3 Pick. 92.

4. A consideration executed, as labor performed, money paid, &c., must be alleged to have been done at the defendant's request, otherwise the promise will appear to be *nudum pactum*. But a past consideration beneficial to the defendant, and to which he assents afterwards, has been held to be sufficient. 14 Johns. 378.

5. In the case of agreements, *not under seal*, a good consideration must always be alleged and proved.

6. When a contract consists of several distinct parts, it is sufficient to state so much as contains the entire consideration for the act, and the entire act promised. *Clarke v. Gray*, 6 East, 567. Collateral matters may be omitted. *Ibid.* *Miles v. Sherwood*, 8 East, 7. See 2 East, 2. Or such as are irrelevant to the breach; or such as are merely insensible. 2 B. & P. 51.

7. But when the contract is entire, to do several things, it cannot be declared on as a several contract to do one of those things.

8. It is not necessary in any case, in declaring on a promise, to

state that it was made in writing; not even in declaring on a promissory note. The plaintiff may declare on the contract or promise, and use the memorandum as evidence of it. See 4 Johns. R. 237.

9. Where the count is on a promise made on an executory consideration, it is necessary that performance should be averred; but if the consideration is executed, it is unnecessary.

Where the general allegation, "although often requested," is sufficient, and where a special request must be alleged.

Where the promise is to perform or pay a mere debt or duty, this general allegation is sufficient.

Where the debt is not incurred until a request is made, this general allegation is not sufficient; a special request must be alleged. Cro. Eliz. 85, *Devenly v. Welbora*.

Where the promise is merely to pay a sum of money already due, on request, this allegation is sufficient. Yel. 66; Cro. Car. 35; Cro. Eliz. 218; 1 Johns. Cas. 319.

Where the promise is to deliver any thing, other than money, as a horse, &c., on request, a special request must be alleged. Lut. 231.

Where the promise is to pay or deliver money, or any thing else, on a certain day, no special request need be alleged. Cro. Eliz. 218, *Blinde v. Plaine*.

Where the promise is to pay a certain sum of money on a certain day, on request, a special request need not be alleged.

Where the promise is, if a third person does not pay a certain sum of money, to pay the same on a certain day on request, a special request is necessary.

Where the promise is to deliver goods on a certain day on request, a special request must be alleged.

Where the promise to pay is implied by law, the general allegation, "although often requested," is sufficient.

If a promise is made by three, a special request to one is sufficient. Com. Dig. Plead. (c. 71) *cites* Noy, 135.

Of Averments.

As a general rule, the plaintiff ought to aver every thing that is necessary to show that he has a good cause of action.

But mere inducement, the performance of conditions subsequent, matters immaterial, or unnecessarily alleged, or things that are apparent to the court, need not be averred.

Of Averments of Performance, Notice, Request, &c.

In cases of mutual promises, where the performance, on the defendant's part depends on an act to be performed in the first place by the plaintiff, it is necessary that the declaration should contain an averment, either that the plaintiff has performed the act, or some legal excuse for not performing, as tender and refusal; discharge by

the defendant; want of notice, where necessary to be given by the defendant, &c.

Where something is to be done by each party at the same time, he who was ready and offered to do his part, may sue the other for not performing his. 2 Doug. 684.

In *Thorp v. Thorp*, 1 Ld. Raym. 662, Ld. Holt lays down the law on the subject of mutual promises, thus: The bargain of every man ought to be performed as he understood it; and if a man will make such an agreement, as to pay his money before he has the thing, for which he ought to pay it, and will rely upon the remedy that he has to recover the said thing, he ought to perform his agreement. But, on the other hand, if his agreement is otherwise, there is no reason that he should be compelled to give credit, where he did not intend it. And therefore, if two men agree, the one that the other shall have his horse, and the other that he will pay him 10s. for the horse, yet there is no reason that the other should have an action for this money before the horse is delivered.

If, by the agreement, the money is to be paid at a time before the act is to be performed, an action may be had for the money before the performance.

If the money is to be paid on the 10th of September, and the work is to be performed on the 9th, though the promises may seem to be mutual, no action can be maintained for the money without an averment of the performance of the work. *See ibid.*

Where there are several *distinct* considerations for the promise, and independent of its performance, the performance of each of those considerations must be plainly averred. *See 2 Leon. 72.*

Where on a sale of goods by B to A, A agrees to pay B as much as any other person, and B sells goods of the same quality to C. for a certain sum, B can maintain no action against A for a similar sum, without an averment that C paid that sum for similar goods, and that A had notice of the person and of the sum so paid. *Henning's case*, Cro. Jac. 432.

Mutual promises should appear in the pleadings to be concurrent, and both binding at the same time; otherwise, each will be merely *nudum pactum*, or promise without consideration, and consequently not binding.

Executory considerations, must be set forth with accuracy and certainty. *See 1 Saund. 320.*

It has been said that an averment of the performance of conditions precedent, is sufficiently established, by proving that the defendant has waived it. *See Knight v. Crockford*, 1 Esp. R. 194. *Quere.*

But in cases where the plaintiff's promise (*and not the performance of it*) is the consideration of the defendant's promise, it is in no case necessary to aver performance or a readiness to perform on the plaintiff's part; on the contrary, where there are mutual remedies, if, by the terms of the plaintiff's promise, the time for the performance of it elapsed without his having performed, and the time

for the performance of the defendant's promise has since elapsed, the plaintiff may recover against the defendant for not performing his promise, and leave the defendant to recover for the plaintiff's non-performance in like manner. 1 Lev. 293; 1 Salk. 112; 1 Lev. 87; Comb. 256. But not where performance on the plaintiff's part is the consideration for that on the defendant's part. 7 Co. 10, *b*.

Where the defendant cannot know how much to pay, without notice *from the plaintiff*, notice must be averred in the declaration. See Hard. 42.

Otherwise if it depends on a stranger, for then the defendant must inform himself at his peril. 2 Bul. 44; Cro. Car. 133.

Where the performance of the defendant's promise depends upon some act to be done by the plaintiff, and lying within the plaintiff's knowledge, it must be averred in the declaration that the defendant had notice of such act. 2 Cro. 432.

Where the defendant's performance depends upon some act to be done by a stranger, equally known to both parties, no notice need be alleged. 2 Cro. 137; 2 Bula. 144.

Where the defendant's performance depends on some act to be performed by a stranger, known by the plaintiff, but not by the defendant, not only performance by the stranger must be averred, but also notice of it to the defendant. See 2 Cro. 432.

Where the defendant is to perform before a stated time, and the performance depends upon notice to be given by the plaintiff, an averment of notice after that time is bad; because then the defendant's promise is discharged, for want of seasonable notice by the plaintiff.

Where notice is necessary, yet the want of it is excused by the party's absconding to avoid it. 1 Salk. 214.

A request impliedly contains in it a notice of every thing purported by it, but to answer the purpose of a notice, it must appear to have been made at the proper time and place, and to the proper person. Cro. Eliz. 250.

It should, however, be pleaded as a notice, as well as a request; for if notice is necessary, and a request only is pleaded, it would be bad on a special demurrer. Cro. Jac. 228.

A *videlicet* is useful to prevent the danger of a fatal variance in those cases where a statement of *immaterial* circumstances may impose a necessity of proof of them, as alleged; but where the circumstances are material, the danger is not prevented by a *videlicet*. 4 D. & E. 314.

Of a variance.

A variance in the declaration, from the terms of the contract offered in evidence of it, is fatal. An erroneous description of the subject matter of the promise is a variance.

An error in stating the legal import of the contract itself, is a variance. So, a mistake of the amount of sums in express contracts,

or dates, or the number of the parties, or the time, or the place of delivery or payment. So, where part only of the contract or promise, if entire, is stated. So, if the contract is conditional, and it is declared on as absolute, and *vice versa*. So where the evidence does not prove the whole of the promise, as declared on. If any alternative, option, or discretion is left to either party in a contract, it must be stated, or there will be a fatal variance; for a promise in the alternative is no proof of an absolute one. *See* Bos. & Pul. 216; 8 East's R. 8.

If the plaintiff should declare, that, in consideration of, &c., the defendant promised, *amongst other things*, to pay so much, it will be fatal, as from his own showing it appears that he has not stated all the promise, and judgment will be arrested after verdict, Al. 5.

Yet where A contracted to deliver B a young horse worth £80, with a warranty that it had never been in harness, a declaration was supported though the warranty was omitted in it. But this was on the ground that the warranty was a distinct promise, and not part of the same. Yet it will be safer in such cases generally, to insert the whole agreement in one count at least.

Of assigning the breach.

In general, the breach may be assigned in the words of the promise, or in any words, which contain the sense or effect of the promise, though not the precise words of the contract. Yelv. 39; Ray. 14; 3 Lev. 170. Thus if money is promised to be paid to the plaintiff's *wife*, the breach may be assigned, that it was not paid to the plaintiff.

Where the breach depends upon the happening of a particular event, the happening of the event should be averred.

The plaintiff may assign as many breaches of the contract, in the same count, as he thinks fit, without liability to exception for duplicity. But if the plaintiff declares for a penalty which becomes due on any single breach, at common law it will be duplicity to assign more than one in a single count, though this is remedied by the English statute. 8 & 9 W. III.

If some breaches are well assigned and others not, and there is a general verdict with entire damages, judgment will be arrested. *See* however, 2 Johns. R. 283. *See also*, 2 Bin. 287.

But in such case, if there is a demurrer to the whole declaration, judgment will be given for the breaches well assigned. 1 Saund. 286, n 9.

The breach should be co-extensive with the promise, for if larger or narrower, the declaration oftentimes will be bad. 1 Vent. 64; 2 Sid. 447, 440; Hard. 320. And though in some cases where the breach is narrowed, the declaration may stand, yet the evidence will be restrained to the breach so narrowed. 3 D. & E. 307.

Where a promise is to do one of two things, the plaintiff must conclude with alleging that the defendant has performed neither; since the performance of either of the alternatives will be a performance of his contract. Hard. 320.

But to assign a breach properly, it is recommended rather to follow the best precedents, than to trust to general rules and principles, the exceptions to which are numerous, and which possibly may govern the very case in hand. Where a breach may be assigned in general terms, and where it is necessary to state particulars, it is not easy in every case to determine; indeed an intimate acquaintance with special pleading and long experience, can alone secure safety to a practitioner, who ventures to plead without reference to the draughts which have received the sanction of the courts.

Of special damages.

Where *particular* damages arise to the plaintiff, from the defendant's breach of contract, which are merely collateral, and not necessarily resulting from it, such damages should be stated specially; otherwise the plaintiff will not be permitted to give evidence of them. They must be stated with the names of persons, but it is not necessary to state any number or amount precisely. It is obvious that no evidence will be admitted of any damages, which have arisen since the commencement of the action. *Lawes on Assu.* 283.

In alleging such damages, it seems sufficient to say, that, by reason of the premises, *the consequences complained of*, happened, and leave the particular manner of their happening to the evidence. *See* 1 T. R. 508. When the nature of the case renders it impracticable to give a very circumstantial account of these special damages, so much as the subject matter allows, is all that reasonably can be expected. 8 T. R. 130. This was a case of tort, but the reason of the rule applies to other cases.

It seems, if special damages are alleged, but there is a sufficient cause of action without them, it is in no case necessary to enter into any evidence of them. This is the rule in torts. *See Cook v. Field*, 3 Esp. R. 133.

1. INDEBITATUS ASSUMPSIT.

In this form of action, the subject matter of the debt must be shown in the *indebitatus* count, in order that it may appear, that the debt is grounded on simple contract, and not on a specialty; and any general words, by which that may be made to appear, will be sufficient. *Buckingham v. Costendine*, Cro. Jac. 214.

But, though the promise be ever so express, yet, if you do not set forth *the cause* of the promise, it will not bear an assumpsit, though you give ever so just a debt in evidence. Because from the generality of the declaration, it will not appear, but that the action is grounded on a specialty. *See Palmer v. Stavelly*, 12 Mod. 511. Besides, if the declaration is too general, the judgment on the record will not enable the defendant to plead *former recovery* to a subsequent action brought for the same cause.

This action may be maintained on a foreign judgment, and it seems, also, upon a judgment of any court, *not of record*. *Doug.*

1, 4. The judgment is sufficient consideration for an implied promise.

Indebitatus Assumpsit cannot be maintained on a collateral undertaking; a special count is necessary. 1 Vent. 268. Therefore it will not lie on a promise to pay the debt of another.

Where debt will not lie, generally indebitatus Assumpsit cannot be maintained; and therefore, it will not lie on mutual promises. In most cases, however, where money is payable by instalments, Indebitatus Assumpsit may be maintained for the first instalment, although debt cannot be maintained until the last day of payment. So, if goods are to be delivered at different times, this action may be maintained after each delivery, but debt will not lie until the whole are delivered. Lawes on Assu. 347.

In general, it may be observed, that where the plaintiff declares on a special agreement, and also on the general counts in Indebitatus Assumpsit, if he fails in his attempt to prove his special count, still he may recover, if he proves sufficient to maintain his general counts. Doug. 61.

This action is either, 1, for goods sold &c. ; 2. services performed &c. for a certain price; or, 3, it is for money had and received by the defendant to the plaintiff's use; or, 4, for money which the plaintiff has lent to the defendant; or, 5, which he has laid out for the defendant's use at his request; or, 6, it is for the balance found due to the plaintiff, on a statement of accounts with the defendant; or, 7, for so much as the plaintiff is reasonably entitled to; or, 8, for use and occupation. With regard to the money counts, they may be joined in one, as in the precedent, subjoined in its proper place, and the plaintiff will recover on either so much as he proves. 4 Johns. R. 280.

1. For goods sold, &c.

To maintain the count for goods *sold and delivered*, there must be an actual delivery. The count for goods *bargained and sold*, is proper, where there has been no delivery.

The count for *goods sold and delivered*, may be maintained for the recovery of goods obtained fraudulently.

But this count cannot be sustained, where the price of the goods is partly to be paid in goods, &c. The special agreement to that effect, must be shewn in the declaration.

Where the rate of damages is to depend on the price agreed between the buyer and seller, that price must be shewn in the declaration.

Where goods are sold, to be delivered at a future day, and no day of payment is set, nor understanding that the goods are to be paid for on delivery, but earnest is paid; the vendor may maintain this action for goods bargained and sold, immediately, before delivering the goods. See 2 Bl. Com. 448; 1 Str. 407; See also 1 Salk. 113.

Where goods are sold generally, though earnest has been paid,

the vendor may retain the goods till payment, though he cannot sue for the price until he has delivered or tendered the goods. 3 East. R. 102. But if the goods are sold, but a future day is set for the payment, the buyer may take away the goods immediately, as the seller waives his lien on the goods. See Dyer, 30, a.

Where A sells B a horse, and B gives earnest (which may be a small piece of money, a glove or any thing else as well as money), and leaves the horse in A's possession, and the horse dies before delivery to B, A may recover the price of the horse under this count. But if earnest is not paid, and there is no memorandum in writing, the loss will fall on A. 3 Barn. & Ald. 855; 7 East, 571.

Where a number of things of the same kind, as ten barrels of flour, are bargained for, the seller can maintain no action until all of them are delivered or tendered, unless it was expressly agreed, that each article should be paid for, *when delivered*. See 2 New R. 61.

So Indebitatus Assumpsit may be maintained for the value of goods obtained by fraud, waiving the tort. 3 Taunt. 274.

Where goods are bought by sample, and on examination are found of inferior quality; the buyer is not obliged to take them, even although a proportional allowance is offered, and although it may be customary in such cases, to take them in that way. 6 Taunt. 445.

Where goods are sold by sample, and the sample fairly corresponds with the commodity in bulk, the seller is not answerable if the goods turn out to be unmerchantable. And the seller is not liable for a latent defect, where there is no fraud, without an express warranty against it. 2 East, 314.

But on every contract of sale to furnish manufactured goods, whether by sample or otherwise, if there is no opportunity to inspect them, the law implies a warranty that they shall be merchantable, however low the price may be. 4 Camp. 169, 144; 2 Camp. 169, 144; 2 Camp. 391.

If an article is sold "with all faults" expressly, the seller is still answerable, if he practices artifice to prevent the discovery of defects. *Mellish v. Motteux*, Peake's N. & C. 115. Or, if at the time he knew of a latent defect, which it was not in the power of the buyer to discover. 3 Camp. 506, 351.

Where goods are sold by sample or warranty, and turn out to be of an inferior quality, the buyer may return them, or tender them back; but if he retains them, he cannot set up the inferior quality of the goods to reduce the price to a *quantum valebant*, but must rely on the warranty for damages. 2 Wils. 319; 1 Camp. 40.

In Massachusetts it is settled, that a sale of chattels by auction is within the statute of frauds. *David v. Rowell*, 2 Pick. 64. There must, therefore, be a memorandum in writing.

2. For work done, &c.

It seems to be a general rule, that where work has not been performed according to contract, the party is not bound to accept it, and in such case, the plaintiff cannot recover.

So, where the work has been improperly and unskillfully performed, and the defendant has derived no benefit from it. *See Denew v. D'Averill*, 3 Camp. 451.

So, if the transaction is illegal, the plaintiff cannot recover for his labor and pains, and whether it be *malum in se*, or merely *malum prohibitum* makes no difference. *See Bensley, &c. v. Bignold*, 5 B. & M. 335.

Where there is nothing to the contrary, in the terms of the special agreement under which work has been done, the plaintiff may recover under this count. *Holt's R.* 236.

Where there is a special contract to perform certain work at an agreed price, and a particular mode of payment is stipulated, the plaintiff must declare specially. But if any of the work is done under *additional orders*, the plaintiff may recover for that under this count or a *quantum meruit*. *Ibid.*

But if the plaintiff, of his own mere motion, deviates from the plan and uses bad materials, he cannot recover at all. In the language of Chief Justice Mansfield, in *Ellis v. Hamlin*, (3 Taunt. 52,) "if the defendant is obliged to pay, in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing, how far soever distant from the contract stipulated for." 1 Camp. 38; 7 East's R. 479; 13 Johns. 96, 53; 14 Johns. 377. At any rate he can recover no more than the value of his services to the defendant; and, if to the defendant they are of no value, the plaintiff cannot recover at all.

In England no action can be maintained by counsel for their fees. And, if a fee is given to counsel, to attend a cause, which he does not attend, no action lies to recover it back. But, in this country, it is supposed the law is otherwise in both cases.

If a person entices away an apprentice, the master may recover for the apprentice's labor in this form of action. 1 Taunt. 112; 3 Maul. & Sel. 191.

An action cannot be maintained to recover a sum of money for endeavoring to procure a pardon. Nor if paid, to recover it back. 3 Esp. R. 253. *Quære.* *See Sty.* 465. Public policy seems to require, that such applications should proceed from disinterested motives.

Where services are performed merely under an expectation of a legacy, no action can be maintained for them. *Stra.* 728.

Where parties intend a contract by deed, but it is executed by one only, if any services are done under the contract, by the person who executes the deed, he may recover under this count in *Assumpsit* against the other, who has not executed it. 3 Esp. R. 42.

An auctioneer guilty of gross negligence at a sale, can recover nothing for his services. 3 Camp. 451.

The printer of a libel can recover nothing for his services, against his employer.

If an engineer makes too low an estimate of the expense of erecting a bridge, &c., either from negligence or want of skill, whereby great expense is incurred, he will not be able to recover for his services in making the estimate. 1 Car. & P. 352.

In *Moneypenney v. Hartland, &c.*, Chief Justice BEST, lays down the rule, "where negligence or want of skill is sufficiently made out, unless the work is entirely useless to the defendants, they must pay him and seek their remedy in a cross action; otherwise, by a small error, a man might deprive himself of all remuneration. 2 Car. & Payne, 378.

3. Money had and received.

Generally, where one person receives money, to which another is entitled *in foro conscientia*, this is the proper form of action and mode of declaring.

But in this count, the precise sum alone, without interest, is recoverable, unless there is a specific agreement to pay interest. *Moses v. M'Farlane*, 2 Bur. 1005; *De Haviland v. Bowerbank*, 1 Camp. 52; 1 B. & P. 286; 4 M. & S. 478.

Any thing received by the defendant *as money*, e. g. bank bills, will be sufficient to justify this manner of declaring. But if not received *as money*, it is otherwise. 13 East, 20. 3 Camp. 199.

If A gives B money to pay C's debt, but countermands before payment, C can maintain no action for the money against B, whether he has paid over to A or not. 1 Moore, 74; 7 Taunt. 339.

If the plaintiff is entitled to the money, it is of no consequence whether the defendant received it of the plaintiff himself, or of a third person. As, if the plaintiff has been compelled by duress to pay a sum of money to the defendant, or the defendant has obtained it from the plaintiff by any species of fraud, this form of action may be maintained. So, if he has paid the defendant, under mistake of facts, or for a consideration that has failed, &c. &c. But, where the plaintiff has paid to the defendant the price of a horse warranted sound, which turns out to be unsound, this action cannot be maintained, but only a special action on the warranty. Cowp. 818; Doug. 23. But, if A pays B for a horse, with liberty to return it within a certain time, or the like, and A returns it accordingly, he may recover the price back in this action. See 7 T. B. 181.

If the plaintiff, without being *particeps criminis*, pays money to the defendant, on a consideration illegal in itself, (for instance, usury,) it may be recovered back in this form of action. See *however*, 6 Esp. 25, n.

The drawee of a forged bill, who accepts and pays it, cannot recover it back. See 6 Taunt. 76; 3 Bur. 1356.

Or, if the plaintiff is *particeps*, he may recover back the money while the consideration is executory, but not after it is executed. 2 B. & P. 467.

If money is paid to A, for the use of B, A cannot set up the illegality of the consideration as a defence, in an action by B to recover this money, as received by A to his use. 1 B. & P. 3.

Wherever A delivers B a sum of money to apply to a particular

purpose, and B neglects to apply it, an action for money had and received may be maintained by A against B. 1 Salk. 9.

Generally, where money in dispute is deposited with a stakeholder, &c., the person legally entitled to it, may recover it under this count. 9 East, 378; 1 H. Bl. 218.

If A sells goods belonging to B without authority from him, B may recover the money received for them in this form of action, or may maintain trover at his election. See *Longchamp v. Henry*, Doug. 137. See also another case where plaintiff was permitted to recover under this count, where specified property and not money was delivered. *Ld. Raym.* 1007.

Where a sheriff claimed a larger fee than he was entitled to, and the attorney paid it, it was held, he might recover back the excess under this count. 2 Barn. & Al. 562.

Where A, being ignorant of circumstances, which would be a good defence to B's claim, pays B who is aware of them, A may recover the money back in this form of action. 3 Mod. 635. But if A, knowing all the circumstances, or having the means of knowing all circumstances, pays B a claim, which he is under no legal obligation to pay, he cannot. 5 Taunt. 543; 1 Esp. R. 84. Yet, it seems, if A, *forgetting facts within his knowledge*, which would discharge him, should pay B, a sum of money, he may recover it back, as money lent, or money had and received. *Lucas & al. v. Worswick*, 1 Moody & Robinson, 293.

A, in paying a note, gives B a counterfeit bill; the amount of it may be recovered by B under this count against A. See 4 Esp. 201; 17 Mass. R. 28, 376.

A forges a bill of exchange in B's name, on C, in favor of D, who for a valuable consideration indorses it to E, who is ignorant of the forgery. C pays E, supposing the bill of exchange to be drawn by B; C cannot recover the money back from E. See 3 Bur. 1354; 6 Taunt. 76.

A pays money to B by mistake, and directs him to pay it to C; B, before countermand, pays it accordingly. A cannot maintain this action against B, though he may against C. *Cowp.* 566, 806; 4 Bur. 1964; Doug. 637.

A pays B for 100 lbs. weight of a commodity at a certain rate per pound. There turns out to be only 50 lbs. A may recover back the amount overpaid, under this count; or the whole purchase money, if it was of the essence of the contract, that there should be 100 lbs.

A pays B a sum of money upon trust; while the trust continues, a count for money had and received will not lie; but after the determination of the trust, whatever remains unexpended may be recovered back under this count. 8 Taunt. 263; *Holt's N. P. Cas.* 500.

Generally, where A owes B a sum of money, and B assigns the debt over to C, *with A's assent*, C in his own name, may recover the debt under this count against A, as for money received by A

to his use. *Surtees et al. v. Hubbard*, 4 Esp. R. 204; 1 H. B. 239.

This doctrine, however, should not be carried too far. Ought the assignee, in any case, to be able to maintain an action as *for money had and received*, where the assignor could not have maintained the same?

Where negotiable paper is made payable to bearer, any *bona fide* holder of the note, may recover under this count against the maker or drawer. 3 Bur. 1516.

A, being indebted to B, promises to accept a bill to be drawn on him for the amount; B draws in favor of C; C indorses to D. This promise of A is not an acceptance, and D cannot maintain an action for the amount, either on a count, as for an acceptance, or on a count, for money had and received by A to his use. 1 East's R. 98, *Johnson v. Collins*.

If A pays money to B to be applied to a particular purpose, and B, by mistake, pays it to C, who is not entitled to it, A cannot maintain this action against C, for want of privity. 2 Camp. 123.

The acceptor of a bill of exchange gives B money to pay it; the holder sues B; B may take advantage of any defence which the acceptor might set up. *Redshaw v. Jackson*, 1 Camp. 372; *Baker v. Birch*, 3 Camp. 107.

Where a deposit is made on a contract *which is afterwards rescinded*, under this count, the deposit may be recovered back. 1 Camp. 337; 2 Esp. R. 639; 1 T. R. 133.

But not while the contract continues open. Doug. 24; 7 East, 274.

Wherever the insured are entitled to a return of premium, they may recover it back under this count. Thus, if the policy is void on account of a non-compliance with warranties; if the ship be not sea worthy and there is no fraud in the insured; if the voyage is divisible and part only of the risque is incurred; if by mistake of the insured, there is short property on board; either the whole or a proportional part of the premium, may be recovered back under this count.

But where the voyage is illegal, or the policy is a wager policy the premium cannot be recovered back. See Marsh. & Park on Return of Premium.

If a man, having lost his receipt, or having any other good defence pays money a second time, by the judgment of a court having jurisdiction, if he finds his receipt afterwards, he cannot recover the money back; otherwise, if he pays it without suit, through his own mistake or the fraud of the other party. 7 T. R. 269; 2 Stark. 85; 1 Esp. R. 279; 2 ib. 547. See also, *Moses v. M'Farlane*, 2 Bur. 1005; 2 H. Bl. 411; 16 Mass. R. 306; 17 ib. 394; 18 ib. 435; 12 Johns. 347; 4 T. R. 431.

If money is received under a void authority, it may be recovered back under this count, and although the authority claimed is judicial. 1 Ld. Raym. 742.

Under this count the plaintiff may recover money, which a sheriff has collected on execution, or it will lie against the sheriff's executors. 3 Salk. 323.

If a revenue officer seize goods not liable to seizure, and the owner pays him money to regain them, under this count the owner may recover back the money so paid. *Irving v. Wilson*, 4 T. R. 485.

If money is given to an agent, to expend upon an illegal transaction, after the agent has paid it over, no action lies against him, to recover it back. 1 Salk. 22. See Doug. 697. Nor against the receiver, if the consideration is executed. Cowp. 792. But otherwise while it is executory, for it may then be countermanded. 3 Taunt. 277. And, therefore,

Where A receives money of B, to pay over to C, on an illegal contract, C may recover it under this count, any time before B countermands it. 1 Bos. & Pul. 3, 296.

If A claims certain fees of office, to which he is not entitled, and B pays them, B may recover them back under this count. 2 Sid. 4; Willes, 536.

If an infant *embezzles* money, it is held, that the owner may recover it, in an action for *money had and received*. See Peake's Nisi Prius Cases, 223; 1 Esp. R. 172.

And generally, where money is obtained by fraud and deceit, it may be recovered back in an action for *money had and received*. *Dana v. Kemble*, 17 Pick. 545.

4. *Money lent and advanced.*

If money is advanced to B at A's request, this action may be maintained against A; for the loan is to A, though the money is paid to B. But, if declared on as a loan to B at A's request, it will be bad; or, if it is in fact a loan to B at A's request, A will not be bound without a memorandum in writing under the statute of frauds. 1 Vent, 311; 1 Bur. 373; 2 Wils. 141.

If money is paid to the wife at the husband's request, it may be declared on as a loan to the husband. 3 Wils. 388.

If public stock is loaned, the lender must declare specially on the contract, and cannot recover under this count. 1 East, 1; 5 Burr. 2589.

Money lent on a pledge may be recovered under this count; if, however, the pawn-broker agreed to stand to the pledge only, no action can be maintained. Str. 919.

5. *Money paid and expended.*

In this count it is necessary, that it should be alleged, that the money was paid at the defendant's request, as well as for his use. And this request may be implied, where the party was under a legal obligation to pay. But not if the plaintiff pays the money against the express prohibition of the defendant. *Stokes v. Lewis*, 1 T. R. 20.

If A owes B a sum of money, and C, at A's request, satisfies the demand, by giving a note or bill of exchange, so that A is discharged from the debt to B; C may recover in this action, as for money paid and expended for A's use, and even although the note he gave, has not become payable. *Quare. See Proctor v. Gooch*, 2 Esp. R. 571. Otherwise of a bond, before payment. 3 East, 169; 2 Barn. and Ald. 51.

If one of the joint makers of a promissory note, after it becomes due, gives his bond to the holder for the amount of the note, he cannot maintain this action for contribution, until he has actually paid money on the bond. *Maxwell v. Jameson*, 2 Barn. & Ald. 51. The reason assigned by Justice BAYLEY is, that, if the obligor, should recover the money, it is still possible that he may never pay it over to the obligee.

This is the proper count for sureties, or bail to recover the sums of money which they have paid for their principals. And the bail, in this form of action can recover all necessary expenses they have been put to, in sending after the principal, and all charges which are necessary to secure themselves. *Fisher v. Fallows*, 5 Esp. R. 171; but not those, arising from an improvident defence of the action, brought by the creditor against themselves as bail. *Ibid.*

Under this count, one surety, who has paid more than his proportion, may recover a contribution from the others.

But it is decided, if there are three sureties, A, B and C, and A and B pay the whole debt, they must sue C *severally* to recover the amount which he is bound to contribute. *Kilby et al. v. Steel*, 2 T. R. 282; 5 Esp. 104, *cites* 3 Bos. & Pul. 235.

It seems that where there are more than two sureties, for instance, six, and four of them are insolvent, and one of the two others pays the whole debt, whether voluntarily or by compulsion of law, he can recover, of the other solvent surety, no more than his proportion of the whole debt, viz. one sixth; but in equity, perhaps it might be otherwise. 2 Bos. and Pul. 268, 270.

If A persuades B to become co-surety with him for another, and A pays the whole debt, he cannot recover contribution against B. *Turner v. Davies*, 2 Esp. R. 478.

If damages are recovered against several tort feorsors, and the execution is levied on the property of one, he cannot recover contribution from the rest. 1 Camp. 343; 8 T. R. 186.

Where a sheriff or jailer *voluntarily*, though without any corrupt intention, suffers an escape, and in consequence is obliged to pay the debt, he cannot recover it of the debtor. *Peake's N. P. C.* 144, *a.*

It seems, if A does an act, *wrong on the face of it*, by B's order, and B expressly promises to indemnify A for it, A can recover neither indemnity nor contribution of B.

But, if the act is apparently doubtful or indifferent, A may recover on an *express* promise to indemnify him, made by B. Or, if the act, thus doubtful, is performed by B's order, the law will *imply*

a promise to indemnify, from B's express order, who, in this case, is the only tortfeasor. See *Betts v. Gibbens*, 2 Adol. & Ellis, 57.

If one of two coach proprietors, is sued for a tort done by their servant, in their absence and without their concurrence, he may recover a contribution from the other proprietor. *Wooly v. Battie*, 2 Car. & Payne, 417.

Where A and B were jointly liable to a demand, and A alone was sued, and judgment was recovered against him alone, it was held, he could have no action for a contribution against B. *Quare*. 14 Johns. 318.

If A, at B's request, pays an illegal bet for B, he cannot recover the money of B. *Clayton v. Dilly*. 4 Taunt. 165. Otherwise if A should pay the winner, in compliance with an order from B, in general terms.

Where a husband went abroad, leaving his wife behind, who died in his absence, and the plaintiff paid the wife's funeral expenses, suitable to the husband's rank, without his knowledge, it was held, he might recover. 1 H. Bl. 90.

5. Account stated.

An action on this count cannot be maintained against an infant, not even for necessities, because he has not discretion to state an account.

Under this count interest is not recoverable except—

Where two persons balance their accounts against each other, the law implies a promise from the one against whom the balance is found to pay it to the other. And this action may be maintained between partners *after* the balance is struck between them on a dissolution, and though there is an express covenant by deed to account. 2 T. R. 479. And if some of the items of charge, allowed in the statement of the accounts, are such as would not have supported an action, still it is too late to object to them after the account is stated, and the defendant must pay the balance. Proof of the acknowledgment of *one* item is sufficient to maintain the count for so much, though the count is for "*divers sums of money*." 18 East, 249.

Wherever there is a liquidated and fair demand, this count may be supported. And money paid, may be proved under it, if defendant assents to the payment, of which very slight evidence will be sufficient. It is, therefore, a proper count to be inserted to guard against a variance, in declarations on bills of exchange and promissory notes; and is proper to be used in cases, where there has been an adjustment of a loss, under a policy of insurance.

A variance between the balance declared on, and the one proved, is immaterial. B. N. P. 129.

But, if A promises B, to pay him the balance, which may be found due, without stating a precise sum, it will not support an account stated. *Teall v. Auty*, 4 Moore, 543.

7. *Quantum meruit and quantum valebant.*

If goods are bought, without any price being agreed upon, the law implies a promise, on the part of the buyer, to pay the seller as much as they are reasonably worth, or, if work is performed, without any stipulation with regard to the wages, the law implies a promise, that the employer will pay the laborer, as much as he reasonably deserves to have. These implied promises are the foundation of the above counts, which may be used in all analogous cases.

8. *Indebitatus assumpsit, for use and occupation.*

This form of action may be used for the occupation of any real estate, which is capable of being held by the defendant. It may be maintained too, where the occupation is by a third person under the defendant, to whom the plaintiff has given permission to occupy. So also, it may be maintained against a trespasser who occupies, the plaintiff waiving the tort, and availing himself of an implied promise raised by law. See 1 T. Rep. 378. See also, *Lamine v. Dorrill*, 2 Ld. Raym. 1216. This action for use and occupation, may be maintained against an infant, as for necessities. 3 Taunt. Rep. 578.

The tenant in this action is not allowed to dispute the landlord's title. 5 Term. R. 4.

For many other cases, where this form of action is proper, reference must be made to the precedents; but it may not be amiss to make a few passing remarks in relation to the recovery of interest.

9. *Interest.*

Where the principal sum is not due, but interest is to be paid in the mean time at stated periods, Assumpsit may be maintained for the interest as it becomes due. *Greenleaf v. Kellog*, 2 Mass. R. 568.

If there is nothing in the contract itself to the contrary, the declaration may state, "that the defendant, being indebted to the plaintiff in the sum of — for interest on the forbearance of divers sums of money, before that time due and owing," &c. *Lawes on Ass.* 487.

The general rule with regard to interest, in England, is, to allow interest in an action for money had and received, where there is an express promise to pay interest, or where any thing is shown in evidence to raise an inference of such promise; or where there is proof that the defendant has made interest on the money; or lastly, on negotiable instruments, made payable on a particular day, from that day. 1 Camp. 50.

Where interest has been allowed on former balances of account, between the same parties, from the time of striking them, it will

afford sufficient ground to warrant the inference of a similar promise with relation to subsequent balances. *Nichol v. Thompson*, 1 Camp. 50, n.

But interest will not be allowed, in an action to recover back money obtained fraudulently ; or, money paid by a third person to defendant for plaintiff's use ; nor, in an action of Assumpsit on a foreign judgment. Neither, in an action on a policy, can interest be recovered on the amount insured. 1 Camp. 129, 518 ; 2 Camp. 462.

If goods are to be paid for by a bill, but it is not given ; interest should be allowed from the time the bill would have been due. 2 Camp. 472, 490.

Interest is not recoverable after a tender, even on a bill of exchange or a note of hand. 3 Camp. 296.

DECLARATIONS IN GENERAL ASSUMPSIT.

Indebitatus assumpsit on accounts annexed to the writ.

1. In a plea of trespass on the case ; for that the said D, at &c., on &c., being indebted to the plaintiff in the sum of &c., according to the account annexed, in consideration thereof then and there promised the plaintiff, to pay him that sum on demand ; yet the said D, though requested, hath not paid the same, but refuses so to do. To the damage, &c.

NOTE. Where the *ad damnum* by mistake is made for too small a sum, as appears by computation of the sums laid in the declaration, the court will permit the *ad damnum* to be increased, even after a verdict for a sum larger than the *ad damnum*, which it would be error to take judgment upon. This however, it seems, they will do upon the terms of the defendant's having a new trial. *Tomlinson & al. v. Blacksmith*, 7 Durnford & East, 133 ; 7 East.

Quantum meruit for goods, &c. sold, and labors, &c. done.

2. SECOND COUNT. And for that the said D there- afterwards on the same day, in consideration that the plaintiff had, before that time, sold and delivered to the said D at his request, other goods, wares and merchandises, than those mentioned in the said account, but of the same kinds, and at the same times therein mentioned, and had also done and performed divers labors and services, in and about the said D's business, and at his like request, other than those mentioned in said account but of the several kinds therein specified, promised the plaintiff, to pay him as much money as he reasonably

deserved to have therefor, on demand, which the plaintiff avers is another sum of &c. ; of all which the said D there afterwards on the same day had notice ; yet the said D, though requested, hath not paid the same, but unjustly neglects and refuses so to do. *Stevens v. Pearce, Essex, 1794.* T. PARSONS.

NOTE. This is the usual form of practice in this State, where generally an exhibit, or schedule of particulars of account, is annexed to the writ. Where to secure the action, more than one count is used, the *fiction* diversity of the goods, &c. is averred by other than in the account annexed," and this averment is material ; for the omission of "other" has been decided in England, to be bad upon special demurrer. In this the English practice differs from ours. There, no exhibit is ever attached to the writ or declaration ; and, if wanted, is usually obtained by a rule to show them at a judge's chambers. Nor indeed is such an exhibit necessary ; for the labor, &c. may be stated generally, and the authorities all agree, that it would be good. However, possibly, the omission, if defendant had not notice of the particular demand, might be a cause of continuance on motion. (MSS.)

Indebitatus assumpsit for balance due on account.

For that the said D, on &c., at &c., being indebted to the plaintiff in the sum of &c., according to the annexed account, *and to balance the same*, in consideration thereof, then and there promised the plaintiff, to pay him the same on demand ; yet though requested, the said D hath never paid the same sum, but neglects it.

JOSIAH QUINCY.

Indebitatus assumpsit for money had and received.

For that the said C, on &c., at &c., being indebted to the plaintiff in the sum of &c., for so much money, before that time, had and received by the said C, to the plaintiff's use, in consideration thereof, then and there promised the plaintiff, to pay him that sum on demand ; yet, though requested, the said C hath never paid the same, but refuses so to do.

NOTE. A count for money had and received by the defendant, *to the use of the executor as such*, may be joined to a count for money had and received *to the use of the testator* ; but a count for money due to executor *in his own right* cannot. *Petrie v. Hannay*, 3 T. R. 659. But an action for money had and received *by defendant as administratrix* to the use of the plaintiff, cannot be joined with counts against the defendant as administratrix ; for such a count charges her in her own right and time. *Jennings v. Newman*, 4 T. R. 347, 565.

So Declaration for money had and received to the plaintiff's use *in his capacity of administrator* in his own time, was held good on argument. S. J. C. Essex, Nov. T. 1787, *Shipman v. Thompson*, S. P. Willes, 103, agreed; though he might have declared in his own right only. 2 T. R. 476.

Where money is owing to two partners; and, *after the death of one*, it is paid to a third person, the surviving partner may maintain an action for money had and received, *in his own right*, and not as survivor. *Smith v. Barrow*, 2 T. R. 476. So may executor in his own right. But aliter if the partner did not die first. (MSS.)

The Same for money lent and accommodated.

For that the said D, at &c., on &c., being indebted to the plaintiff in the sum of &c., for so much money before that time *lent* and accommodated, by the plaintiff, to the said D, at his request, in consideration thereof then and there promised the plaintiff to pay him the same on demand: yet, &c.

NOTE. The word "lent" is a technical word, and no man can be indebted to another for money *lent*, unless the money be *actually lent* to the person himself. Therefore, in an action for money *lent* to D, instead of L. who was the defendant, judgment was arrested, though the court stated it at *L's request*. *Marriot v. Lister*, 2 Wils. 141. Imp. Plead. 198, Notes. But, if the Declaration had stated the money *paid, advanced or delivered* to D at L's request, it had been good. Carth. 446; Comb. 470; 2 Browl. 40.

It is necessary to state, that the money was lent, laid out, &c. *at the defendant's request*; otherwise, it is error. Cro. Eliz. 218. (MSS.)

The Same for money lent to the wife.

For that the said D, on &c., at &c., being indebted to the plaintiff in the sum of &c., for so much money, before that time *lent* by the plaintiff *to Ann, the wife of the said D, [in his absence], and at his special request*, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand; yet, &c. *Stephenson v. Hardy*, 3 Wil. 388; Imp. Pl. 243.

NOTE. A motion was made in arrest of judgment in this case, upon the authority of the preceding cases; but, by the Court, it is admitted that if the word "advanced" had been used, it would have been good; and in this case "lent" is only equivalent; the cases cited are good law, but a loan *to the wife at the request of the husband*, is in law a loan to the husband himself. (MSS.)

The Same for money laid out and expended.

For that the said D, at &c., on &c., being indebted to the plaintiff in the sum of &c., for so much money

before that time laid out and expended by the plaintiff, for the use of the said D. at his request, in consideration thereof, then and there promised the plaintiff to pay him the same on demand ; yet, &c.

The Same, the money counts joined.

For that the said D, at &c., on &c., being indebted to the plaintiff in &c., for money by the plaintiff before that time laid out, expended, and paid for the said D, at his special request ; and for other money by the plaintiff before that time, lent and advanced to the said D, at his like request ; and, for other money, by the said D, before that time, had and received to the use of the plaintiff in consideration thereof, then and there promised the plaintiff, to pay him the same sums on demand ; yet, &c. *Imp. Pl. 207.*

NOTE. The usual way of declaring for foreign coin lent, is to state for so much foreign coin lent and advanced, amounting to so much in American money. 1 Leon. 41 ; *Imp. Pl. 193.* (MSS.)

The Same, for foreign coin lent.

For that the said B, on &c., at &c., being indebted to the plaintiff in the sum of 1000 florins of foreign money of the value of &c., of the United States, for so much money, before that time lent and advanced by the plaintiff to the said B, at his request, in consideration thereof, then and there promised the plaintiff, to pay him the same on demand ; yet &c. *Imp. Pl. 194.*

Quantum meruit for labor of a child ; by parents.

For that the said H, on &c., at &c., in consideration that the plaintiff* had permitted C. B. the infant son and servant of the plaintiff, to labor for and serve the said H, in his husbandry and business, from &c., to &c., promised the plaintiff, to pay him so much money as he reasonably deserved to have therefor on demand ; &c.

E. TROWBRIDGE.

Against surviving partner. Indebitatus Assumpsit.

1. For that the said B and one E, whom the said B hath survived, on &c. at &c., being indebted to the plain-

* Here it would be more safe to insert the words, " at the special instance and request of the said H."

tiff in the sum of &c., according to the annexed account [and to balance the same,] in consideration thereof, then and there promised the plaintiff, to pay him the same on demand ;

Quantum meruit.

2. **SECOND COUNT.** And for that the said B and E, there afterwards on the same day, in consideration that the plaintiff had, before that time, sold and delivered to the said B and E, at their request, divers goods, wares, and merchandises, other than those mentioned in the said account, but of similar quantities, and qualities, and had also done and performed divers labors and services, in and about the said B and E's business, and at their like request, other than those mentioned in said account, but of the several kinds therein specified, promised the plaintiff, to pay him so much money as he reasonably deserved to have therefor on demand ; which the plaintiff, avers to be the sum of &c. ; of all which the said B and E there afterwards on the same day had notice ;

Money had and received.

3. **THIRD COUNT.** And for that the said B and E. there afterwards on the same day, being indebted to the plaintiff in the sum of &c., for so much money, before that time had and received by the said B and E, for the plaintiff's use, in consideration thereof, then and there promised the plaintiff to pay him the same on demand ;

Conclusion.

Yet, though requested, the said B and E, or either of them, in the lifetime of the said E, or after his death, the said B. never paid the said sums, or either of them, to the plaintiff, but wholly refused, and the said B still refuses so to do.

NOTE. The time alleged may be any time before the death of E ; and, in the same way, other counts may be added *mutatis mutandis*. If two partners purchase goods, and one dies, the survivor may be charged in indebitatus Assumpsit generally, without taking notice of the partnership, or that the other is dead, and he, surviving partner. *Hyatt v. Hyre*, Comb. 288.

So a partner may join actions for money due in his own right, and as surviving partner.

So a debt due *to the defendant*, as surviving partner, may be set off against one due from him in his own right. *Slipper v. Stidstone*. Espi. N. P. C. 47 ; 5 T. R. 493 ; and a debt due *from the plaintiff*, as surviving partner, may be set off against one, due to him in his own right. *Andrade v. French*, 6 T. R. 582.

But, if an action is brought *by* a surviving partner, for goods sold and delivered in the lifetime of the deceased partner, he must declare on a promise of both, as partners, in the lifetime of his partner, and state his survivorship ; and the breach assigned, that the defendant had not paid to the plaintiff and his partner, in his lifetime, nor since his death, to the plaintiff. *Bullock v. Jackson*, Esp. N. P. 137.

When an action is brought against a firm or company, they should all be named at length, as "*partners in trade jointly negotiating under the firm of &c.* ;" and, if joint owners of a vessel, and liable as such, it may be well to state it. But generally, where joint debtors are not partners, they must be declared against as common defendants. (MSS.)

By surviving partner. Indebitatus assumpsit.

For that the said D, on &c. at &c., being indebted to the plaintiff and one A, who was then alive, but since deceased, and whom the plaintiff survived, in the sum of &c., according to the account annexed, in consideration thereof, then and there promised the plaintiff and the said A to pay them the same on demand ;

Quantum meruit.

SECOND COUNT. And for that the said D there afterwards on the same day, in the lifetime of said A, in consideration that the plaintiff and the said A had, before that time, sold and delivered to the said D, at his request, divers other goods and merchandises than in the account annexed, but similar thereto, and had also done and performed other labor and services for the said D, than in the same account, but of like kinds, and at the like request of the said D, promised the plaintiff and the said A, to pay them so much money as they reasonably deserved to have therefor, on demand ; which the plaintiff avers to be the sum of &c. ; of all which the said D, there afterwards on the same day, had notice ;

Money had and received.

THIRD COUNT. And for that the said D, on &c., at &c., in the lifetime of the said A. being indebted to the plaintiff and the said A, in &c., for so much money before that time had and received by the said D, to the use of the plaintiff and the said A, in consideration there-

of, then and there promised the plaintiff and the said A, to pay them that sum, on demand;

Conclusion.

Yet, though requested, the said D never paid the said sums, or either of them, to the plaintiff, and the said A in his life, or, since his death, to the plaintiff, but refused and still refuses so to do.

NOTE. If a quantum meruit alone is used, the beginning should a little vary from the above form, and might be as follows, "and for that the said D, on &c., at &c. in consideration that the plaintiff and one A, who was then alive, but since deceased, and whom the plaintiff hath survived, had before that time, sold and delivered to the said D, at his request, divers goods and merchandises of them the said A and the plaintiff, promised them to pay them so much money as they reasonably deserved therefor, on demand;" &c. But it is more usual for the plaintiff to describe himself in the writ "as surviving partner of A &c., deceased," in which case, no alteration need be made in the second or third counts.

If money, due to two partners, be, after the death of one, paid over to a third person for their use, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *Smith v. Barrow*, 2 T. R. 476. (MSS.)

By husband and wife. Indebitatus assumpsit.

For that the said D, on &c., at &c., being indebted to the said A, while sole, and before her intermarriage with the said D, in the sum of &c., according to the account annexed, in consideration thereof, then and there promised the said A to pay her that sum on demand.

Quantum meruit.

SECOND COUNT. And for that the said D, there afterwards on the same day, in consideration that the said A, while so sole, had, before that time, sold and delivered to the said D, at his request divers other goods and merchandises, than those in the same account, but similar thereto; and had also done and performed certain other labor and services for the said D, at his like request, than those mentioned in the same account, but of like kinds; promised the said A, while so sole, to pay her so much money as she reasonably deserved therefor, on demand; which the said A and E aver to be the sum of &c., of all which the said D, there afterwards on the same day, had notice:

Money had and received.

THIRD COUNT. And for that the said D, at &c., on &c., being indebted to the said A, while so sole, in the sum of &c., for money, before that time had and received by the said D, to the use of the said A, in consideration thereof, then and there promised the said A, while so sole, to pay her the same on demand :

Conclusion.

Yet, though requested, the said D never paid the said sums, or either of them, to the said A, while sole, or to the said E and the said A, or either of them, since their intermarriage, but refused and still refuses so to do. *Imp. Pl. 239.*

NOTE. In all cases, where a *chose in action* of the wife is to be reduced into possession, an action for that purpose must be brought in the names of both. This appears to be the settled rule, though there have been contradictory decisions. *Milner v. Milner*, 3 T. R. 631. (MSS.)

Against husband and wife. Indebitatus assumpsit.

For that the said D, while sole, and before her intermarriage with the said E, on &c., at &c., being indebted to the plaintiff in &c., according to the annexed account, in consideration thereof, promised the plaintiff to pay him that sum on demand :

Quantum meruit.

SECOND COUNT. And for that the said D, while sole, as aforesaid, there afterwards on the same day, in consideration that the plaintiff, at the request of the said D, had, before that time, sold and delivered her other goods and merchandises than those mentioned in the account annexed, but similar thereto, and had done and performed certain other labor and services in the business of the said D, than those mentioned in the same account, but of like kinds, and at the like request of the said D, promised the plaintiff, to pay him so much money as he reasonably deserved therefor, on demand ; which the plaintiff avers to be the sum of &c., of all which the said D there afterwards on the same day had notice :

Money laid out, &c.

THIRD COUNT. And for that the said D, while sole, as aforesaid, on &c., at &c., being indebted to the plain-

tiff in the sum &c., for money by the plaintiff before that time laid out, expended and paid for the said D, while sole, and at her like request, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand;

Conclusion.

Yet, though requested, the said D, while sole, or since their intermarriage, the said D and E, or either of them, have not paid the same, but neglected, and still neglect so to do. *Imp. Plead.* 233.

NOTE. As it is clearly law, that, for all debts due to the wife before coverture, the husband and wife must join, so also they must be joined in all actions accruing against the wife before coverture. *Mitchinson v. Hewson*, 7 T. R. 348.

In all actions where the husband and wife join, *her interest must be stated*, for otherwise the promise, &c. shall be intended, to the husband; as that the cause of action existed before marriage or the tort was done to her. *Bidgood v. Way et ux.* 2 Bl. Rep. 1236.

Where work and services are done by the wife during coverture, and there is no express promise to the wife, the husband must sue alone for her earnings; for, in the eye of the law, she is his servant. But if there be an *express* contract with the wife, the husband may assent to and make it a *joint contract*, and then she may join; or he may sue alone. 2 Bl. Rep. 1239; Cro. Eliz. 61; Imp. Pl. 231. (MSS.)

By executor or administrator. Indebitatus assumpsit.

For that the said E, on &c., at &c. being indebted to the said S [the intestate or testator,] in the sum of &c., according to the annexed account, in consideration thereof then and there promised the said S, in his lifetime, to pay him that sum on demand;

Quantum meruit.

SECOND COUNT. And for that the said E, on &c., at &c., in the lifetime of the said S, in consideration that the said S, at the request of the said E, had, before that time, sold and delivered to the said E, divers other goods and merchandises, than in the said account, but similar thereto: and had also, at the like request of the said E, done and performed certain other labor and services in and about the business of said E, than in the same account, but of like kinds, promised the said S to pay to him, so much money as he reasonably deserved therefor,

on demand ; which the plaintiff avers to be the sum of &c., of all which the said D there afterwards on the same day had notice ;

Money laid out, &c.

THIRD COUNT. And for that the said D, on &c., at &c., being indebted to the said S, in another sum of &c., for money before that time laid out, expended, and paid by the said S for the said D, at his request, in consideration thereof then and there promised the said S in his lifetime, to pay him the same on demand ;

Conclusion.

Yet, though requested, the said D never paid the same to the said S, in his lifetime, or since his death, to the plaintiff, but refused, and still refuses so to do. *Imp. Plead.* 353.

NOTE. In Assumpsit brought by administrator *de bonis non*, the promise may be laid to have been made to the first administrator ; and it will be a good answer to the plea of limitations ; or plaintiff may declare on a promise to himself, and give in evidence such prior promise. *Hirst v. Smith*, 7 T. R. 182. (MSS.)

Against executor or administrator. Indebitatus assumpsit.

For that the said S, in his lifetime, on &c., at &c., being indebted to the plaintiff in the sum of &c., according to the account annexed, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand ;

Quantum meruit.

SECOND COUNT. And for that the said S, in his lifetime, on &c.; at &c., in consideration that the plaintiff had, at the request of the said S, before that time, sold and delivered to him divers other goods and merchandises than those in the same account, but similar thereto ; and had also, at the like request of the said S, done and performed for the said S in his business, certain other labor and services than in the same account, but of like kinds, promised the plaintiff to pay him so much money as he reasonably deserved therefor, on demand ; which the plaintiff avers is the sum of &c. ; of all which the said S, thereafterwards on the same day, in his lifetime, had notice ;

Money laid out.

THIRD COUNT. And for that the said S, in his lifetime, on &c., at &c., being indebted to the plaintiff in another sum of &c., than in the same account, for money before that time laid out, expended and paid by the plaintiff for the said S, and at his like request, in consideration thereof, then and there promised the plaintiff to pay him the last mentioned sum on demand;

Conclusion.

Yet, though requested, the said S, in his lifetime, or after his death, the said D, never paid the same sums, or either of them to the plaintiff, but refused, and the said D still refuses so to do. *Imp. Pl. 373.*

NOTE. Though an action lies for money had and received to the plaintiff's use as executor, 3 T. R. 659; 2 T. R. 476; yet no action lies against executor, for money had and received to the plaintiff's use by executor as such. *Rose et ux. v. Bowler, etc., executors*, 1 H. Bl. 108; 4 T. R. 347.

But in an action against administrator, a count on *insimul computasset* with the administrator as such, may be joined with counts on promises by intestate; for administrator is not personally liable. *Secar v. Atkinson*, 1 H. Bl. 102. (MSS.)

In the same way, may be framed declarations by and against surviving executors and administrators, and by and for them against each other; for the conclusions are the only parts which differ from the preceding forms. (MSS.)

In declarations by or against executors or administrators, they must be stated as such; the debt must be stated, as due from or to the testator or intestate; the promise must be alleged previous to his death. *Imp. Pl. 359.* But in an action against them, it will be sufficient, if it appear that they are sued as executors or administrators, though not so expressly named in the beginning. 1 Saund. 112; Str. 781; *Imp. Pl. 372.*

Declarations by or against husband and wife, administratrix or executrix, differ from common actions by executors only in the conclusions. (MSS.)

Indebitatus assumpsit by executors for rent due. Testator died during the quarter.

1. For the use and occupation of two leasehold stables with the appurtenances, situate in &c. by the said D, at his request, and by permission of the said S, in his lifetime, and the plaintiff's since his death, for the space of one quarter of a year before then elapsed, used, occupied, and enjoyed, in consideration, &c.

Quantum meruit.

2. In consideration that the said S, in his lifetime, and the plaintiff since his death, at the like request of the said D, had permitted the said D to use, occupy, and enjoy two other leasehold stables with the appurtenances, situate &c., which the said D accordingly used, occupied, and enjoyed for a long space of time, to wit, one quarter of a year before then elapsed &c. *Imp. Pl. 360.*

Indebitatus assumpsit for work &c. done.

1. For that the said E, on &c., at &c., being indebted to the plaintiff in the sum of &c., *for the labor and services of the plaintiff, by him before that time done and performed, in and about the business of the said E, at his request,* in consideration thereof promised the plaintiff, to pay him that sum on demand; yet &c.

NOTE. This and the subsequent forms are used, where no exhibit or account of particulars, is annexed to the writ, and such is the universal practice in the English courts. It has been before observed, that an exhibit is not necessary by law.

The English form, in the above case, for labor, &c., generally is more verbose; "for the work and labor, care and diligence of the plaintiff, by him before that time done, performed, and bestowed, in and about the business of the said D at his request, in consideration thereof," &c.; which words may be substituted for those in italics in the form. But it is apprehended, that the import is exactly the same, and therefore conciseness should be sought. *Imp. Pl. 206.*

The subsequent forms contain only the substantial parts of declarations, where different from the first, and must be completed by reference to that, and *quantum meruit* subjoined, according as the case may be. (MSS.)

Quantum meruit for the same.

2. And for that the said E, on &c., at &c., in consideration that the plaintiff had, before that time, *done and performed certain other labor and services* in the business of the said E, at his request, promised the plaintiff to pay him so much money as he reasonably deserved therefor, on demand; which the plaintiff avers is the sum of &c., of all which the said E, there afterwards on the same day, had notice; yet &c.

NOTE. Or, as in the English forms, "done, performed, and bestowed other his work and labor, care and diligence in and about other business of the said E, at his request," omitting the parts in italics. *Imp. Pl. 206.*

In assumpsit the plaintiff may declare generally for work and labor, without setting out what kind of work or labor. Carth. 276; Vent. 44. So, if work be done by a mechanic, the declaration need not state, that it was done, as a *tailor*, a *carpenter*, a *shipwright*, &c. 2 Saund. 373; 2 Keb. 810; Imp. Pl. 209; though pleaders generally specify it. Imp. Pl. 211. (MSS.)

Indebitatus assumpsit, for work by servants with carts, &c.

1. For the labor and services of the plaintiff, *by him and his servants, and with his horses, carts and carriages*, before that time done and performed in the business of the said B, at his request, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff, had, before that time, *by himself and his servants, with his horses, carts, and carriages*, done and performed other labor and services in the business of the said B, at his request &c. *Imp. Pl. 212.*

NOTE. By the authorities, the parts in italics are not necessary. The declarations may be varied by the adoption of the English forms, by the insertion of their general words "work and labor, care and diligence." (MSS.)

For serving as a schoolmaster.

1. For the labor and services of the plaintiff, *as a schoolmaster*, by him, before that time, done and performed in teaching and instructing *one J. B.** the infant son of the said B, *in reading, writing, and good manners, and other accomplishments, for then a long time elapsed*, at the request of said B, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff had, at the request of the said B, before that time, done and performed certain other labor and services, *as a schoolmaster*, in teaching and instructing *one J. B.** the infant son of the said B, *in reading, writing, and good manners, and other accomplishments, for a long time then elapsed, &c.* *Imp. Pl. 215.*

NOTE. The parts in italics may be omitted. (MSS.)

Indebitatus assumpsit for servant's salary wages.

1. For the wages or salary of the plaintiff, before that

* Or say the children or child, without name.

time due and owing to the plaintiff from the said B, for the service of the plaintiff, before that time done and performed, as the servant of the said B, on his retainer, and at his request, in consideration &c.

NOTE. This is the proper count for an agreed salary ; but if that cannot be proved, add *indebitatus assumpsit* and *quantum meruit* for labor &c., generally. Imp. Pl. 254. (MSS.)

Indebitatus assumpsit for drawing plans, &c.

1. For the labor and services of the plaintiff in drawing divers plans and elevations in architecture for the said B, at his request and on his retainer ; and also in superintending a certain dwellinghouse of the said B during the erection thereof, on his like retainer and at his like request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said B, had done and performed other labor and services, in drawing divers other plans and elevations in architecture for said B ; and also in superintending a certain other dwellinghouse of the said B during the erection thereof, at the like request of said B, &c. Imp. Pl. 255.

NOTE. Add counts for labor, &c. generally ; which would seem to be sufficient in all cases of this kind, though pleaders generally declare as above. (MSS.)

1. For the labor and services of the plaintiff, before that time done and performed, in the going and making of divers journies, and giving his attendance in the business of said B, at his request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of said B, had before that time done and performed other labor and services, in the going and making of divers other journies, and giving other his attendance in the business of said B, &c. Imp. Pl. 330.

NOTE. For these counts, may be substituted the common counts, for labor and services, generally. (MSS.)

Indebitatus assumpsit for work as a measurer and surveyor.

1. Being indebted to the plaintiff in &c., for the labor

and services of the plaintiff, before that time done and performed, *as a measurer and surveyor*, for the said B, at his request in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of said B, had, before that time, done and performed other labor and services, *as a measurer and surveyor*, for the said B, &c. *Imp. Pl. 258.*

Indebitatus assumpsit by factor or agent.

1. Being indebted to the plaintiff, in &c., for the labor and services of the plaintiff, before that time done and performed, as the factor or agent of said B, *in selling and disposing of divers goods, wares, and merchandises of said B; and also in transacting other the business of said B*, and at his request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said B, before that time had done and performed other his labor and services, as the factor or agent of the said B, *in selling and disposing of divers other goods, wares and merchandises of the said B*, and in transacting other the business of said B, &c. *Imp. Pl. 335.*

NOTE. The parts in italics may be omitted. (MSS.)

Indebitatus assumpsit for cure of a wound, by one not a surgeon or apothecary, and for materials found.

1. For the labor and services of the plaintiff, before that time, done and performed, in healing and curing the said B of divers wounds, diseases, and maladies, at the request of said B, and for divers ointments, plasters, and other necessary things, administered and applied on that occasion, by the plaintiff at the request of the said B, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of the said B, had, before that time, done and performed other his labor and services, in healing and curing the said B of divers other wounds, diseases, and maladies ;

and had, at the like request of the said B, before that time, administered and applied divers other ointments, plasters, and other necessary things on that occasion &c. *Imp. Pl. 258.*

NOTE. Where the account of the physician or surgeon, is annexed to the writ, care should be taken that the particular disease or complaint should not be expressed, especially if of a scandalous or offensive nature. See 2 Wils. 20. The charges should be for *medical attendance, advice, medicines, &c.* in general terms.

Indebitatus assumpsit for a surgeon.

1. For labor and services of the plaintiff, *as a surgeon*, before that time done and performed, at the request of the said B, in healing and curing the said B, (and one S. B., his wife, and other persons of the family of the said B, *as the case may be*), of divers bruises, wounds, and diseases, and for divers medicines, potions, and plasters, before that time provided and administered by the plaintiff in that particular, at the like request of the said B; and also for divers journies and attendances, before that time, performed and made by the plaintiff for the said B, at his request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of the said B. had, before that time, done and performed other his labor and services *as a surgeon*, in healing and curing the said B, (and S. B., his wife, and other persons of his family, *as the case may be*) of divers other bruises, wounds, diseases, and maladies, &c., *as before.* *Imp. Pl. 224.*

NOTE. In the same way the declarations may be for a physician or apothecary, omitting such parts as are unnecessary in the particular case. A declaration for work and services as a surgeon, a physician, &c., without more, would be sufficient. See *Imp. Pl. 226, 227.* Declarations for midwife and apothecary; in substance, the suit is for labor &c., *as a midwife* for A. D., wife of the defendant.

This action lies for medicines, provided and delivered for an infant daughter against the father. R. Ray. 62. But the declaration must state, for physic delivered for the daughter, at the request of the father, and not to the daughter. Keb. 439; *Imp. Pl. 227*; 2 Vent. 36. 'So midwife may maintain an action for delivering a third person, if it were at the request of the defendant. *Imp. Pl. 227.* But *quære* of the above distinction between *to* and *for*, as it has been repeatedly determined that goods *delivered to* a third person, *where the credit is not given to him, at the request of the defendant*, is good

without a note in writing, and may be declared on in *indebitatus assumpsit*, as such. Salk. 23; 2 L'd Ray. 842, 982; 6 Mod. 77; 1 H. Bl. 120. But, in such case, the declaration should be for goods delivered to A, at B's request, not *sold* and delivered; for *sold* creates a liability in A; and then B's liability is but collateral, and should be in writing under the statute of frauds, and *especially* declared on. L'd Raym. 842; 2 Vent. 36; 1 Salk. 28. See the ensuing declaration. (MSS.)

Indebitatus assumpsit for goods delivered to a third person. 2 Vent. 36.

1. For divers goods, wares and merchandises, by the plaintiff, before that time sold to said B, and, according to the terms of said sale, delivered to one A, at the request of said B, in consideration &c.

Quantum meruit need not specify particulars. Cro. Jac. 206.

2. In consideration that the plaintiff, at the request of the said B, had, before that time, sold to the said B divers other goods, wares, and merchandises, and according to the terms of said sale, had delivered the same to one A, &c. 3 Went. 63.

NOTE. Add a count, in consideration that the plaintiff would sell and deliver to one A, &c. divers other goods &c., B promised to pay &c., and a *quantum meruit* of the same kind in both cases with an averment, that the goods were sold and delivered at a certain time and place.

Indebitatus assumpsit for meat, drink, &c. for defendant's son, or a third person, at defendant's request.

1. For meat, drink, washing, and lodging, and other necessaries before that time found and provided for one A B, *the infant son of said B*, at the special request of the said B, in consideration &c. Raym. 67; Keb. 439; Imp. Pl. 294.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said B, had, before that time, found and provided other meat &c., for one A B, *the infant son of the said B*, &c. 3 Went. 62.

NOTE. If, for a third person, omit the parts in italics.

In a case like this, it was moved in arrest of judgment, that *indebitatus assumpsit* would not lie, but it ought to have been a special action on the case; but the court held the action well brought, and that it was an original undertaking by defendant, and A B was not li-

able. 2 Ld. Raym. 982; 6 Mod. 77; 3 Bul. 31; Imp. Pl. 294, 303. (MSS.)

Indebitatus assumpsit for meat, drink, &c.

1. For meat, drink, washing, lodging, and other necessities, by the plaintiff, before that time, found and provided for said B, at his request, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said B, had, before that time, found and provided for the said B, other meat, drink, washing, lodging, and other necessities &c. *Imp. Pl. 291.*

Indebitatus assumpsit for education of defendant's daughters.

1. For the board, maintenance, and education of one A D and B D, daughters of said D, before that time found, supplied, and provided by the plaintiff, at the request of said D, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff had before that time, at the request of said D, found and provided other board, maintenance and education for the said A D and B D, the said daughters of the said D, &c. *3 Went. 66.*

Indebitatus assumpsit for stabling, &c. horses.

1. For horsemeat, stabling and attendance by the plaintiff, before that time found and provided, for divers horses of the said B, at his request, in consideration, &c.

Quantum meruit.

2. In consideration, that the plaintiff, at the like request of the said B, had, before that time found and provided other horsemeat, stabling, and attendance for divers other horses of the said B, &c. *3 Went. 56.*

Indebitatus assumpsit for agisting cattle.

1. For the agisting and feeding of divers cattle of the said B, by the plaintiff, in his lands and pastures, and at the request of the said B, for a long time then elapsed, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff had, at the request

of the said B, before that time, agisted and fed in his lands and pastures, divers other cattle of the said B, for a long time then elapsed, &c. *Imp. Pl. 306.*

Indebitatus assumpsit for labor done and materials found by a tailor.

1. For work, labor, and services of the plaintiff, *as a tailor* before that time, done and performed in the business of said B, at his request; and for divers materials and other necessary things, found and provided, used, and applied, in and about said work, by the plaintiff, at the like request of said B, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of said B, had, before that time, done and performed other work, labor and services, *as a tailor*, in the business of said B; and had also found and provided, used and applied divers other materials, and other necessary things about said work, at the like request of said B, &c. *Imp. Pl. 209.*

NOTE. These counts are used, when the materials are used about the work; but if not, then a quantum meruit for goods sold, should be used. (MSS.)

Indebitatus assumpsit by a farrier for shoeing, &c.

1. For labor and services of the plaintiff *as a farrier*, in shoeing divers horses for the said B, at his request, and for divers materials and other necessary things, provided and used by the plaintiff in and about that work, at the like request of said B, in consideration &c. — *Add Quantum meruit.*

The same for curing horses, &c.

2. For labor and services of the plaintiff, before that time, done and performed by the plaintiff for the said B in healing and curing divers horses of said B, of divers diseases and maladies, at the request of said B; and for divers ointments, medicines, and other necessary things, administered and applied by the plaintiff on those occasions at the like request of said B, in consideration, &c. — *Add Quantum meruit. Imp. Pl. 344.*

Quantum meruit by a tailor for labor and wares found.

In consideration that the plaintiff, then being a tailor,

at the request of the said B, had fitted, made and mended divers vestments for the said B, with certain wares, by the plaintiff, in that behalf found and provided, &c.

Indebitatus assumpsit by an interpreter of languages.

For a certain stipend and salary, before that time due and payable from the said B, to the plaintiff, for services done and performed by the plaintiff, *as the interpreter of foreign languages, to wit, the Chinese and other languages*, to the said B, and for certain work and labor, and divers journeys and voyages, done and performed by the plaintiff, for the said B, on his retainer and at his request, in consideration, &c. — *Add Quantum meruit.*

NOTE. The words in italics are immaterial.

Indebitatus assumpsit for teaching music.

For the labor, skill, and diligence of the plaintiff, *as a music-master*, before that time performed and bestowed in teaching the wife of said E, music, at the request of said E, and for entrance money, due and payable to the plaintiff from the said E, on that occasion, in consideration, &c. — *Add Quantum meruit.*

Indebitatus assumpsit for mariner's wages, on account annexed to the writ.

1. Being indebted to the plaintiff in the sum of, &c., according to the account annexed, in consideration, &c.

2. In consideration that the plaintiff had, before that time, at the request of said E, done and performed other labor and services than in the account annexed, but similar thereto, on the retainer of said E, &c.

The same against the master on general counts.

1. For the wages and salary of the said E, before that time due and payable from the said E to the plaintiff, for his services done and performed, *as a mate and mariner*, of and on board a certain schooner, called, &c. whereof the said E was master (or owner,) and on his retainer and at his special request, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said E had before that time, done and performed other labor and services for the said E, *as a mate and*

mariner on board a certain other schooner, called &c., whereof the said E was master &c. *Imp. Pl. 261.*

Master v. owner for wages on quantum meruit.

For that whereas the plaintiff, at the special request of the said E, had served as master of his schooner Exchange, and performed a voyage from said M to &c., and back again to said M, for the use and benefit of said E, he, the said E, then and there, in consideration thereof, promised the plaintiff to pay him on demand, so much money as he reasonably deserved for such service, &c.

S. SEWALL.

Another for a sum stipulated as wages.

For that whereas the plaintiff, on &c., at &c., at the appointment and request of the said E, had agreed to go master of his ship S, laden for a voyage from, &c., to &c., and back, the said E, in consideration thereof, promised the plaintiff to pay him wages for said service, at the rate of &c., during his continuance therein. And the plaintiff says, that he did faithfully do the duty of a master of said ship, for &c. months, and &c. days, next before the &c. day of &c., when &c. dollars became due to him for his wages aforesaid, at the rate of &c.; yet though requested, &c.

S. SEWALL.

Another.

For that the said E, on &c., at &c., appointed, and agreed with the plaintiff, to go master of the said E's ship B, a voyage in her from &c., to &c., with a cargo of sugars, and the plaintiff, having accepted of the trust, the said E, in consideration thereof, and that the plaintiff would do the duty of a master, in navigating and taking care of said ship and cargo during said voyage, then at &c. promised the plaintiff to pay him wages therefor, at the rate of &c., a month from the same day; and the plaintiff says, that he proceeded on the voyage aforesaid in said ship, as master of her, and, in all things, faithfully did his duty, from the same day, during said voyage, to wit, from the said &c., to &c., when &c. dollars became due, for his services at the rate aforesaid; yet the said E, though requested, &c.

The same against owner; for one third of the vessel's earnings in lieu of wages, as master.

For that whereas the said E, at &c., on &c., appointed

the plaintiff master of the said E's coasting sloop, called &c. directing him to employ her in coasting backward and forwards, to and from several parts of this Commonwealth, to the best advantage of the said E; and for the plaintiff's service in managing said vessel, the said E. then and there promised him, to allow him, for and during such time as the plaintiff should continue master of the said vessel, such share of the earnings of said vessel, as is customarily allowed to masters of such coasting vessels, which the plaintiff avers to be one third part. Now the plaintiff in fact says, that from &c., to &c., he employed the said vessel in coasting to and from several parts of this Commonwealth, during which time she earned the sum of &c., which sum the said E received from sundry persons, for freight of their goods carried in the said vessel, during the time aforesaid; in consideration whereof the said E, on the same day, at &c., promised the plaintiff to allow and pay him the sum of &c., being one third part of what the said E received as the earnings of said vessel in manner aforesaid; yet, &c.

BOLLON.

The same for wages of servant. Quantum valebant.

For that whereas the said E, on &c., at &c., in consideration that the plaintiff, at the special request of said E, had permitted one A D, then being the *apprentice and servant* of the plaintiff, to serve as a mariner on board the said E's schooner Exchange, for the term of &c., and which service the said A D performed accordingly, promised the plaintiff to pay him, on demand, so much money as the labor and service aforesaid of the said A D were reasonably worth &c.

S. SEWALL.

NOTE. The plaintiff might declare in this case in *indebitatus assumpsit* and *quantum meruit* for labor &c. of his servant *generally*. (MSS.)

Indebitatus assumpsit for a shipwright.

For the labor and services, *as a shipwright*, before that time, done and performed by the plaintiff in repairing a certain ship of the said E, called &c., at his request; and for divers materials and other necessary things, by the plaintiff provided and used, in and about the said work, at the like request of the said E, in consideration &c. — *Add. Quantum meruit. Imp. Pl. 266.*

Indebitatus assumpsit for freight.

For the freight of certain goods, wares, and merchandises of the said E, before that time by the plaintiff, at the request of said E, carried and transported in a certain vessel of the plaintiff *from parts beyond seas, to wit,** from London to the port of Boston aforesaid, in consideration &c. — *Add Quantum meruit* — in consideration the plaintiff had carried and transported divers other goods &c. *Imp. Pl. 277.*

NOTE. An indebitatus assumpsit is good for freight, without mentioning what the freight consisted of. 1 Vent. 100. (MSS.)

Indebitatus assumpsit for hire of a ship.

1. For the use and hire of a certain vessel, with the furniture and tackle thereto belonging, called &c. of the plaintiff, by him, before that time, let to hire and delivered to the said E, at his request, and, by the said E, had and used accordingly *for a long space of time*, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of said E, had, before that time, let to hire and delivered to the said E, a certain other vessel of the plaintiff, with the tackle and furniture thereto belonging, called &c. to be had and used, and which was had and used by the said E. accordingly, promised &c. *Imp. Pl. 343.*

Indebitatus assumpsit for hire of a boat.

1. For the hire and use of a certain boat of the plaintiff, called a punt, by the said E, at his request and by permission of the plaintiff, before that time, had, used, and enjoyed, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said E, had, before that time, let to hire to the said E, a certain other boat, called a punt, and which was accordingly used and enjoyed by the said E, &c. *Imp. Pl. 334.*

Indebitatus assumpsit for demurrage.

1. For the demurrage of a certain vessel called a lighter, of the plaintiff, by the said E, before that time, retained and kept, with divers goods, wares and merchandises, on board thereof in demurrage, in consideration &c.

* Omitted, if the case be different.

Quantum meruit.

2. In consideration that the plaintiff, at the request of the said E, had, before that time, suffered and permitted the said E. to retain and keep, and that the said E had accordingly retained and kept, a certain other vessel of the plaintiff, called a lighter, with certain goods &c. on board thereof, on demurrage. *Imp. Pl. 282.*

Indebitatus assumpsit for carriage of goods by bargeman.

1. For the carriage of divers goods, wares, and merchandises, by the plaintiff, before that time, carried and conveyed *in certain barges* of the plaintiff for the said E. at his request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the like request of the said E, had, before that time, carried and conveyed divers other goods &c. of the said E, *in certain other barges* of the plaintiff, &c. *Imp. Pl. 288.*

NOTE. The same declaration will answer for a land carrier, only inserting instead of the parts in italics, "in certain wagons and carts of the plaintiff, from &c., to &c." *Imp. Pl. 289. (MSS.)*

Indebitatus assumpsit for salvage of an anchor and cable.

1. For the salvage of a certain anchor and cabling by the plaintiff, before that time, saved for and delivered to the said E, at his request, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff had, before that time, saved for, and delivered to the said E, at his like request, a certain other anchor and cabling &c.

Indebitatus assumpsit for carrying passenger.

1. For the carrying and conveying of the said E, from &c., to &c., in a certain ship, called &c., whereof the plaintiff was master, and at the request of the said D, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff had, at the like request of the said E, before that time carried and conveyed the said E, from &c., to &c., in a certain other ship, called &c., whereof the plaintiff was master, &c. *Imp. Pl. 346.*

Indebitatus assumpsit for goods wharfed.

1. For the wharfage of divers goods, wares and merchandises of the said E, before then wharfed and landed, *out of certain vessels*, upon a certain wharf of the plaintiff in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff had, before that time wharfed and landed divers other goods &c. of the said E, at the request of the said E *from certain vessels*, upon a certain other wharf of the plaintiff, &c. *Imp. Pl. 282.*

NOTE. If the goods are wharfed and put on board a vessel, then say, "for the wharfage, landing, housing and weighing of divers goods, &c., before then loaded from, and off the wharf of the plaintiff on board a certain vessel of the said E, at his request," &c. The parts in italics seem immaterial. *Imp. Pl. 284. (MSS.)*

Indebitatus assumpsit for warehouse room.

1. For warehouse room and stowage of divers goods, wares, and merchandises of the said E, at his request, before that time, found and provided by the plaintiff, in the warehouses of the plaintiff, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of the said E, had, before that time, found and provided for the said E other warehouse room and stowage, for divers other goods &c. of the said E, in certain other warehouses of the plaintiff, &c. *Imp. Pl. 303.*

Indebitatus assumpsit for premium of insurance.

1. For premiums of insurance, *before that time due and payable from the said E to the plaintiff*, for and upon divers large sums of money, before that time subscribed by the plaintiff, upon divers policies of assurance, to the said E, at his request, in consideration &c. *Add Quantum meruit. Imp. Pl. 331.*

NOTE. Assumpsit, for that the defendant was indebted to the plaintiff in £20 *pro premio*, on a policy of assurance; it was objected, that the plaintiff ought to show a *certain* consideration, what the premium was, and *how* it became due. By the court; it is good, and like Assumpsit *pro quodam salario*, which has been adjudged good. *R. on demurrer. 2 Lev. 153; Imp. Pl. 332. (MSS.)*

For the hire of goods, horses, &c.

1. For the hire of divers goods and chattels of the plain-

tiff, by him, before that time, let to hire to said E, at his request, and by said E, according to that letting to hire, used and enjoyed *for a long time then elapsed*, in consideration &c.

Quantum meruit.

2. In consideration that the plaintiff, at the request of the said E, had, before that time, let to hire to the said E, divers other goods and chattels of the plaintiff, to be used and employed; and accordingly had and used, by virtue of that letting to hire, by the said E, *for a long time then elapsed*, &c. *Imp. Pl. 310.*

NOTE. This declaration will answer for all hirings of horses, carriages, &c. *mutatis mutandis*. *Seem*, that the parts in italics are not material. (MSS.)

Indebitatus assumpsit for use and occupation of a house.

1. For the use and occupation of a certain messuage, or tenement *of the plaintiff*,* situate &c., by the said B, at his request, and by permission of the plaintiff, for the space of half a year, before then elapsed, used, occupied, and enjoyed, in consideration, &c.

Quantum meruit.

2. In consideration that the plaintiff had permitted the said B, at his request, to use and occupy a certain other messuage or tenement *of the plaintiff*,* and that the said E, according to that permission, had used, occupied, and enjoyed the same, for the space of one half year before then elapsed, &c. *Imp. Pl. 294.*

Note. Where the plaintiff declares on a special agreement for use and occupation, he should take care to introduce these general counts, for if he should fail to prove his special agreement strictly as set forth, he will be able to derive no benefit from the liberality of the practice as to the admissibility of evidence under the general counts, unless such general counts are inserted. The variance consequently will be fatal. See *Eaton v. Dugan*, 21 Pick. 538.

Messuage and land.

For the use and occupation of a certain messuage and 100 acres of meadow land, with the appurtenances, situate, &c. 3 *Went. 65.*

Ready furnished lodgings.

For the use and occupation of certain ready furnished

* Not absolutely necessary.

lodgings, being parcel of a certain messuage, situate, &c.,
3 *Went.* 65.

Unfurnished lodgings.

1. For the use and occupation of certain rooms, with the appurtenances, being parcel of a certain messuage, situate &c. 3 *Went.* 65.

Quantum meruit for the same.

2. In consideration that the plaintiff, at the request of the said E, had permitted the said E, quietly to hold and occupy the upper room, in the eastern end of the plaintiff's dwellinghouse, in &c., from &c. to &c., which the said E held and occupied accordingly, promised the plaintiff to pay him so much money, as he reasonably deserved therefor, on demand, &c.

R. DANA.

NOTE. As this action, for use and occupation, would not lie at common law, without an *express promise*, the statute 11 G. II. c. 19, s. 14, seems to have been adopted.

Quantum meruit for labors as a candidate minister of the gospel.

For that, on &c., at &c., in consideration that the plaintiff at the special request of said inhabitants, had, before that time, *viz.* on every Lord's day from &c. to &c. inclusively, and also on a thanksgiving day, and on one lecture day, within that time, publicly prayed with and for, and preached the gospel to the said inhabitants, and instructed them in the principles and doctrines of the Christian religion, the said inhabitants then and there promised the plaintiff, to pay him therefor, on demand, so much money as he reasonably deserved to have, which the plaintiff avers to be the sum of &c.

J. SEWALL.

Indebitatus assumpsit for the same; by a settled minister against proprietors.

For that whereas the plaintiff, on &c., upon the invitation, and at the request of said proprietors, became the settled and ordained minister of the Gospel, in &c. aforesaid, and hath continued so ever since, there doing the duty of such a minister, whereupon the proprietors aforesaid, on &c., owed him [\$130] for his services, for one year ending on &c., and on &c., at &c., in consideration thereof, promised the plaintiff to pay him the same on demand; yet, &c.

R. DANA.

Quantum meruit by a physician.

For that whereas the plaintiff, on &c., at &c., had traveled ten miles, and visited and attended, as a physician, the said E accordingly, on the same day, and had examined into his illness of a dropsy, commonly so called, and had given him advice, relative to his said disorder, prescribed to said E a proper regimen in meats, drinks and exercise, and had given him a written direction, for the procurement and administration of proper medicine, for his recovery and restoration to health, all in the plaintiff's business as a physician, and at his special instance and request; in consideration thereof, the said E then and there promised the plaintiff, to pay him, on demand, so much money as he reasonably deserved therefor, &c.

JOSIAH QUINCY.

Quantum meruit by an attorney.

For that the said E, on &c., at &c., in consideration that the plaintiff, in his business as an attorney, at the request of said E, had, before that time, done and performed certain [other] labor and services, in and about the drawing and engrossing divers [other] writings, instruments, and deeds,* and in going and making divers [other] journeys, and giving [other] attendance about the business of the said E; and* in and about the prosecuting and defending divers [other] suits in courts of law in this Commonwealth, &c. 3 *Went.* 61.

Quantum valebant for goods sold.

1. In consideration of certain goods and merchandises, by the plaintiff to the said D, at his special request, then and there, sold and delivered† [being other but similar to those aforementioned] then and there promised the plaintiff to pay him on demand, so much money as the said goods and merchandises last mentioned, were reasonably worth; and the plaintiff avers, that the said goods and merchandises last mentioned, were, at the time of the sale and delivery aforesaid, reasonably worth the sum of, &c., of which the said D then and there had notice; yet, &c.

S. SEWALL.

NOTE. Such a count may be used in most of the foregoing declarations, instead of a quantum meruit; though the latter seems now to have thrown the former out of use in the English forms. (*MSS.*)

* Used as the case may be.

† If other counts.

Indebitatus assumpsit for work done ; by assignees of bankrupt.

1. For that the said E,* on &c., at &c., being indebted to the said S, before he became bankrupt in &c., for the labor and services of the said S, before he became bankrupt, done and performed for the said E, at his request, and for divers materials found and provided by the said S, before he became a bankrupt, in and about the business of said E, in consideration thereof, then and there promised the said S, before he became bankrupt, to pay him the same on demand :

Quantum meruit.

2. In consideration that the said S, before he became bankrupt, at the like request of the said E, did and performed certain other labor and services, for the said E, and found and provided divers other materials, in and about the business of the said E, at his request, promised the said S, before he became bankrupt, to pay him on demand so much money as he reasonably deserved therefor ; which the plaintiffs aver is the sum of &c.

Money laid out, &c.

3. For money laid out, expended, and paid by the said S. to and for the use of the said E, at his request, and for other money, before that time, had and received by the said E, for the use of the said S, before he became bankrupt, in consideration &c.

Conclusion.

Yet, though requested, the said E never paid the said sums, or either of them, to the said S, before he became bankrupt, or since, to the plaintiffs, or either of them, but refused, and still refuses so to do. 3 T. R. 779. *Imp. Pl.* 271.

By surviving partner, for money had and received, and goods sold and delivered.

For that the said D, at &c., on &c., being indebted to the said A A and one B B now deceased, whom the said A A has survived, in £1000 as well for the money of the said A A and B B, by the said D, before that time had and received, as for divers goods and merchandises, by the said A A and B B, to the said D, before that time, at his request, sold and delivered, in consideration thereof, then and

* Any time before the issuing of the commission.

there promised the said A A and B B to pay them the same *on demand*.* Yet the said D, though often requested, never paid the same to the said A A and B B, or either of them, in the lifetime of the said B B; or after his death to the said A A, but wholly refused, and yet refuses so to do.† See 2 Saund. 122.

Declaration on all the money counts joined.

For that the said D, at &c. on &c. being indebted to the said A A, in the sum of &c., for money, by the said A A, before that time laid out, expended, and paid for the said D, at his special request; and for other money by the said A A, before that time lent and advanced to the said D, at his like request; and for other money, by the said D, before that time had and received to the use of the said A A, in consideration thereof, then and there promised the said A A to pay him the same sum of money, when he should be thereto afterwards requested [or on demand;] yet &c. *Imp. PL 207.*

SPECIAL ASSUMPSIT.

1. *For not delivering goods, according to contract, under various circumstances.*

For not delivering malt according to agreement upon request.

For that on &c. at &c., in consideration that the plaintiffs, at the instance and request of the said D [defendant,] had then and there bought of the said D, a certain large quantity, to wit, one hundred quarters of malt, at and for a certain price, then and there agreed upon between them, he, the said D, faithfully promised the plaintiffs, well and truly to deliver to them the said one hundred quarters of malt, whenever he, the said D, should be thereto requested; and the plaintiffs in fact say, that although the plaintiffs afterwards, *viz.*, on &c, at &c., requested the said D, to deliver

* In the precedent in Saunder's Reports, from which this declaration is abstracted, the usual allegation to pay the same "*when he should be thereto afterwards requested*," is omitted; and in precedents of a similar kind, in 2 Saund. 117 and 208, there is the same omission. But in a precedent, 1 Saund. 70, it is inserted, and in most of the other entries which have been consulted, in the modern ones without an exception. But *quære* if it be necessary, and shall not be intended if not otherwise stated? In the practice in Massachusetts, the usual allegation, is to pay the sum "*on demand*." (MSS.)

† From this it appears, that all the common counts may be joined in one without risk. See on this point, a learned note by Serj. Williams, in 2 Saund. 122. (Note 2.) (MSS.)

them the said one hundred quarters of malt, and were then and there *ready and willing to pay the said D for the same* according to the terms of the said sale, and were then and there *ready and willing, and offered to accept and receive*, the said one hundred quarters of malt, of and from said D; yet the said D did not, when requested, as aforesaid, or, at any other time before or since, deliver to the plaintiffs the said one hundred quarters of malt, or any part thereof, but wholly refused, and still refuses so to do.

NOTE. This declaration was held good on a motion in arrest of judgment; though objected that the plaintiffs should have averred an actual tender, and not a mere readiness and willingness to pay for the malt. *Rawson et al. v. Johnson*, 1 East's T. R. 203. (MSS.)

On a contract of sale; non-delivery; mutual promises: special damage, &c.

For that whereas heretofore, to wit, on &c., at &c., by a certain agreement then and there made, by and between the said A and the said C and G, it was agreed that the said C and G should, on or before — then next following, deliver to the plaintiff, on some convenient wharf in said S, at the option of the plaintiff, three thousand feet of good merchantable white pine plank, three inches thick, and of at least thirty feet in length, to be measured from the narrowest side thereof, and that the plaintiff should pay them, on delivery of said plank, \$—, that is to say, \$— for each thousand feet of said plank, in money, current in the town of A, also to assist the master and crew of the vessel which should bring said plank, in unloading the same; and the said agreement, being so made as aforesaid, afterwards, to wit, on &c., at &c., in consideration thereof, and that the said A, at the special instance and request of the said C and G, had then and there undertaken and faithfully promised the said C and G to perform and fulfil the said agreement, in all things on his part and behalf to be performed and fulfilled, they, the said C and G, undertook, and then and there faithfully promised the said A to perform and fulfil the said agreement, in all things on their part and behalf to be performed and fulfilled; and the plaintiff saith, that the said — day of &c., hath long since past, and that although he, the said A, was always ready between said — day of &c., and — day of &c., to accept and take the said plank so agreed to be delivered to him as aforesaid, and to pay the said \$—, and to appoint the wharf in said S, where the

same should be landed, and to assist the master and crew in discharging the vessel as aforesaid ; yet the said C and G, not regarding the said agreement, nor their said promise and undertaking, so by them made as aforesaid, but contriving and fraudulently intending to deceive the said A in this behalf, did not deliver said plank, but wholly neglected and refused so to do ; by reason whereof the said A hath been necessitated, obliged, and compelled to buy another large quantity of good merchantable pine plank, to answer his occasions and use, to wit, three thousand feet of good merchantable pine plank, at a greater and more advanced price than the said plank so as aforesaid agreed by the said C and G, to have been delivered to the plaintiff, to wit, at and after the rate or price of \$— per thousand feet of like good merchantable pine plank, to wit, at said S, and has also been put to great expense of time, and money and labor respecting the premises.

B. MERRILL.

Counts on contract of sale ; mutual promises ; non-delivery, &c.

— For that whereas, heretofore, to wit, on &c., at &c., to wit, at &c., the said E and C, at the special instance and request of said J and D, bargained with the said J and D, to buy of them the said J and D, and the said J and D then and there sold to the said E and C, a large quantity, to wit, one case of cotton cambricks, marked number two hundred and sixty-two, containing thirteen hundred and eighty-four yards of the same cambricks, at the rate or price of \$— for each and every yard thereof, to be delivered by the said J and D, to the said E and C upon demand, and to be paid for by said E and C, on the delivery thereof as aforesaid, and in consideration thereof, and that the said E and C, at the like instance and request of said J and D, had then and there undertaken and faithfully promised the said J and D to accept and receive the said case of cotton cambricks, and to pay them for the same at the rate or price aforesaid, they, the said J and D, undertook and promised to deliver the said case of cotton cambricks to them, the said E and C, as aforesaid ; and the plaintiffs aver, that afterwards, to wit, on &c. last, at said S, they paid for the same, at the rate or price aforesaid, a sum of money, amounting to \$—, and they have ever been ready and willing to accept and receive the said case of cotton cambricks ; yet the said J and D, though often requested, after said payment, have not delivered the same, but wholly neglect and refuse

so to do ; whereby the plaintiffs have lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to them, from the delivery of said case of cotton cambricks.

Also for that whereas, heretofore, to wit, on &c., at &c., to wit, &c., the said plaintiffs, at the special instance and request of said J and D, bargained with the said J and D to buy of them, and they then and there sold to the plaintiffs a certain other case of cotton cambricks, marked number two hundred and sixty-two, for the price and sum of \$—, to be delivered to the plaintiffs by said J and D, upon the payment therefor of said last mentioned sum of money, to be made by the plaintiffs to said J and D, and to be paid for by the plaintiffs to said J and D, on demand ; and in consideration thereof, and that the plaintiffs, at the like instance and request of said J and D, had then and there promised them to accept and receive the said last mentioned case of cotton cambricks, and to pay them the said last mentioned sum of money for the same, on demand, they, the said J and D, promised to deliver said last mentioned case of cotton cambricks to the plaintiffs, whenever the plaintiffs should pay said last mentioned sum to them, the said J and D ; and the plaintiffs aver, that afterward, to wit, on &c., they paid the said last mentioned sum of \$—, to said J and D, to wit, at said S, and that the plaintiffs have ever been ready and willing to accept and receive the same last mentioned case of cotton cambricks ; yet the said J and D, though afterward, to wit, on &c. last, requested, have not delivered the same, but wholly neglect and refuse so to do ; whereby the plaintiffs have lost and been deprived of divers other great gains and profits, which might and otherwise would have arisen and accrued to them, from the delivery of said last mentioned case of cotton cambricks.

SECOND COUNT. Also for that whereas, heretofore, to wit, on &c. last, at B, to wit, at &c., the plaintiffs, at the instance and request of the said J and D, bargained with them to buy of them, and they then and there sold to the plaintiffs, a certain other case of cotton cambricks, consisting of one thousand three hundred and eighty-four yards of cambrick, at and after the rate and price of \$— for each yard thereof, to be delivered to the plaintiffs by said J and D, upon the payment of said price therefor, by the plaintiffs to the said J and D, and to be paid for by the plaintiffs, on

demand; and, in consideration thereof, and that the plaintiffs, at the like instance and request of said J and D, had then and there promised to pay them the aforesaid price of \$— for each yard thereof, amounting in the whole to the sum of \$—, on demand, and to accept and receive the said last mentioned case of cotton cambricks, they, the said J and D, promised the plaintiffs to deliver to them the said last mentioned case of cotton cambricks, whenever the plaintiffs should pay the said last mentioned sum of \$— to them, the said J and D; and the plaintiffs aver, that afterward, to wit, on &c. last, in pursuance and fulfilment of said last bargain and promise, they paid said last mentioned sum of \$— to said J and D, to wit, at said S; and the plaintiffs have ever been ready and willing to accept and receive the same last mentioned case of cotton cambricks; yet the said J and D, though afterward, to wit, on &c., requested, have not delivered the same, but have wholly neglected and refused so to do.

Also for that said J and D, at said S, on &c. last, being indebted to the plaintiffs in another sum of \$—, as well for so much money by said J and D, had and received to the use of the plaintiffs, as for a like sum by the plaintiffs before that time disbursed, laid out, and expended for the use of said J and D, then and there, in consideration thereof, promised to pay the plaintiffs the same last mentioned sum on demand; yet said J and D, though requested, said sum have not paid, but neglect so to do. **B. MERRILL.**

For not delivering corn according to agreement, within one month, at a stipulated place.

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E had then and there bought of the said E, two hundred quarters of corn, at \$20 per quarter, such price to be therefor paid by the plaintiff to the said E, the said E promised the plaintiff to deliver to him the said corn, at S, in one month from that time, viz. the time of sale. And the plaintiff avers, that he always, from the time of making such sale, for the space of one month then next following, and afterwards, was ready and willing to receive the said corn, at said S, *and was ready to have paid for it on delivery*, according to the said stipulated terms; yet the said E, though requested, did not, within one month from the time of making such sale as aforesaid, or at any other time, deliver the said corn to the plaintiff, at said S, or elsewhere, but wholly refused so to do

NOTE. Judgment was arrested in this case, on motion for want of the averment printed in italics; the Court being of opinion, that it was necessary to aver a performance, or what was equivalent thereto; or a readiness to pay, according to the case of *Rawson v. Johnson*. *Morton v. Lamb*, 7 T. R. 125. (MSS.)

For not delivering wheat at several times according to agreement.

For that the said N, on &c., at &c. in consideration that the plaintiff at the special request of said N, had agreed to purchase of him a large quantity, to wit, one hundred bags of wheat, each bag weighing three hundred pounds, and for forty bags, part of the same wheat, to pay the said N \$8 per bag, and for the remaining sixty bags, to pay the market price, at the then next market day, promised the plaintiff to sell and deliver him the said forty bags immediately, and the remaining sixty bags, at the then next market day, at the said stipulated price; and the plaintiff avers that the said N, in part performance of his contract aforesaid, then and there sold and delivered the plaintiff the said first forty bags of wheat; but though the plaintiff was ready and willing to receive the remaining sixty bags of wheat, at the said next market day, to wit, at &c., on &c., and was then and there ready and willing to pay the said N therefor, on delivery, according to the said stipulated price, the said N, though requested, on the said next market day, or at any time before or since, did not deliver the plaintiff the said remaining sixty bags of wheat, but wholly refused and still refuses so to do.

NOTE. Upon breach of contract for the purchase of one hundred bags of wheat, forty or fifty of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot declare as upon an *absolute* contract for the delivery of forty bags on the first day &c., though forty bags were then in fact delivered, but the contract must be stated in the alternative according to the original terms of the contract. *Penney v. Porter*, 2 East's T. R. 2. (MSS.)

For not delivering barley, earnest being paid, and special request made.

For that whereas the plaintiff, on &c., at &c., at the request of the said E, bought of the said E, five bushels of seed barley, at the rate or price of \$1 for every bushel thereof, to be therefor paid by the plaintiff to the said E, and then and there paid to the said E, in hand, the sum of \$1, in part payment of the said price to be paid for said barley, and then and there promised the said E, to pay the residue of the said rate or price, so to be paid for said barley, on the delivery of the said barley; in consideration whereof the

said E, then and there, promised the plaintiff to deliver him the said five bushels of seed barley, on request. And the plaintiff avers that he afterwards, on &c., at &c., requested the said E to deliver him, the plaintiff, the said five bushels of seed barley, and was then and there ready, and offered to pay the said E, the residue of the said price or rate, to be paid for the same. Yet the said E did not, at the time he was so requested, or at any other time, before or afterwards, deliver the said barley, or any part thereof, to the plaintiff, but wholly refused and still refuses so to do. 2 *Went.* 229. WARREN.

For not delivering barley according to agreement, earnest being paid.

For that whereas the said D, on &c., at &c., bargained and sold to the plaintiff fifty quarters of barley, at the rate of \$10 per quarter, in the whole amounting to \$500, the said D, in consideration of \$10, to him in hand paid by the plaintiff, and of \$490, to the said D, to be paid by the plaintiff, upon the delivery of the said barley, then and there promised the plaintiff to deliver the said fifty quarters of barley, at or before &c., which is long since past, at the dwelling of the plaintiff in said S; yet the said D, not minding his said promise, though the plaintiff was always ready, on the delivery of said barley, to pay the said D the said \$490, to wit, \$10 for every quarter thereof, according to his promise aforesaid, the said 50 quarters of barley, or any part thereof, hath not delivered, but wholly refuses so to do. 2 *Inst. Cler.* 125.

NOTE. Mr. Justice Blackstone lays it down as a rule, "that if any part of the price is laid down, if it be but a penny, or any portion of the goods delivered by way of earnest, the property of the goods is absolutely bound by it." So in *Bach v. Owen*, 5 T. R. on an action of Assumpsit for not delivering a mare in exchange for plaintiff's colt, earnest being paid by defendant, it was objected on demurrer, that the plaintiff had not averred that he delivered the colt, which was a precedent condition; but per Buller, "there is no foundation for the objection; the payment of the earnest vested the property of the colt in the defendant, and it was unnecessary for the plaintiff to have averred a tender of it." But Lord Holt is reported to have said the contrary, in *Salk.* 113, and to have declared, that the property is not considered as *absolutely transferred* to the buyer by earnest, and therefore, the money must be paid upon fetching away the goods, *if no other time of payment is mentioned*. Earnest only binds the bargain, and gives the party a right to demand, but then a demand, without payment of the money is void. 2 Bl. Com. 448, note, by Christian; Brown's Civil Law, 355, note. And *quære*, if the case of *Bach v. Owen* was not supportable on other grounds. (MSS.)

On the subject of Earnest, See Law Summary, 91.

For not delivering barley to the plaintiff, earnest being paid, and part delivery.

For that whereas, on &c. at &c., the plaintiff had bought of the said D, and the said D had bargained and sold to the plaintiff, one hundred quarters of as good barley as one W. F's was, to be delivered to the plaintiff at H, between harvest and Candlemas in the same year, where the plaintiff should appoint, after the rate of \$3, per quarter, to be paid by the plaintiff to the said D, whereof the plaintiff then and there paid to the said D, fifty cents in hand, and *agreed to pay* the residue at the times of delivery of said barley, according to the quantity of the same, at every time of delivery, and according to the rate aforesaid; in consideration whereof, the said D then and there promised the plaintiff, to deliver to him the said barley, so bargained and sold, according to the bargain and agreement aforesaid. And the plaintiff avers, that although the said D, in pursuance of his said promise, hath delivered to the plaintiff a certain portion of the said barley, to wit, twenty quarters, and although the plaintiff hath, at all times hitherto, been ready and willing to receive the residue of the said barley, and to pay the said D for the same, according to the agreement aforesaid, and on &c., did appoint his, the plaintiff's house at said H, the place of delivery of the same, and did thereof, then and there give due notice to the said plaintiff, and did on &c. at said H, being the last day of the time stipulated for the delivery of the same residue, and on the last part of said day, to wit, at — o'clock, thereto especially request the said D; yet the said D hath never delivered the same residue or any part thereof, but wholly refuses so to do.

NOTE. This was the case of *Peeram v. Palmer*, Gilb. Law of Evid. Loft's edit. 393, where the main question was, whether defendant was obliged to deliver the residue, not having been fully paid for the quantity delivered. Parker C. J. resolved, that though defendant was not obliged to deliver the first twenty quarters, without payment, yet having done so, it was an implied waiver for so much, and did not excuse him from delivering the residue. (MSS.)

For not delivering 10 hhds. of sugar to the plaintiff, to be delivered upon request.

For that the plaintiff on &c., at &c., at the special request of the said E, bought of the said E, ten hogsheads of sugar, at the rate of \$6 for every hundred weight thereof, and at the same rate for any less quantity, to be paid there-

for by the plaintiff to the said E for the same, and the *plaintiff then and there promised the said E to pay him* for the said ten hogsheads of sugar, at the rate aforesaid, upon request; and, in consideration thereof, the said E, then and there promised the plaintiff to deliver him the said ten hogsheads of sugar, upon request, and although the plaintiff hath always, since the making of said promise hitherto, been ready to pay the said E at the rate aforesaid, for the said sugar, and has often offered so to do; yet the said E hath not delivered the said ten hogsheads of sugar, or any part thereof, though afterwards, to wit, on &c., at &c., and often afterwards thereto requested, but wholly refused and still refuses so to do. 34 *Decl. Morgan's Preced.* 160.

For not delivering all the hops which defendant raised that year, though plaintiff was ready, &c.; on mutual promise.

For that whereas, on &c., at &c., the plaintiff bought of the said E all the hops, which the said E should have growing in the year next ensuing, at the rate of \$12 for every hundred weight thereof, and according to that rate for any less quantity, to be therefor paid by the plaintiff to the said E; and it was then and there agreed by and between the said E and the plaintiff, that the said E should pick and dry all such hops, and should deliver the same so picked and dried, so soon as the same should be picked and dried, as aforesaid, to the plaintiff, and that the plaintiff should pay the said E for the same, at the rate aforesaid, on the delivery thereof, in consideration whereof, and that the plaintiff then and there promised the said E, to perform all the said agreement on his part to be performed, the said E then and there promised the plaintiff to perform all the said agreement, on his, the said E's part to be performed. And the plaintiff avers, that the said E had, in the year next ensuing the making of said agreement, to wit, in the year, &c., growing, a large quantity of hops, to wit, two hundred weight of hops, all which said hops were, in the same year, to wit, on &c., in that year, picked and dried by the said E; and although the plaintiff, always from the time the said hops were so picked and dried, as aforesaid, hitherto hath been ready to receive the said hops, at the rate aforesaid, of the said E, and to pay for the same on the delivery thereof, and hath often requested the said E to deliver the same to the plaintiff, according to said agreement; yet the said E, though requested on the day and year last aforesaid, viz.

at &c. hath not delivered the said hops, or any part thereof to the plaintiff, but wholly refused and still refuses so to do. 35 *Decl. Morg. Preced.* 163.

For not delivering hay in certain proportions according to plaintiff's request and according to agreement.

For that, on &c., at &c., in consideration that the plaintiff *would*, at the special request of the said E, buy of the said E a certain large quantity of hay, to wit, fifty-seven loads of hay, at the rate of \$15 by the load for every load of such hay, to be therefor paid by the plaintiff; the said E then and there promised the plaintiff to deliver him the said hay, from time to time, in such portions and quantities, as the plaintiff should have occasion for and need of the same, upon request. [And the plaintiff avers, that relying on the promise aforesaid of the said E, he did then and there buy of the said E, the said hay at the rate aforesaid;] and the plaintiff further says, that although the said E in pursuance of his said agreement, and promise, hath delivered to the plaintiff a certain part or portion of the said hay, to wit, twenty loads of the said hay, and although the plaintiff hath, at all times hitherto, been and still is ready and willing to pay the said E, for the said hay, bought of the said E, as aforesaid; yet the said E, though the plaintiff hath had great occasion and need for the residue of said hay, and afterwards, to wit, on &c., and oftentimes since, at &c., requested the said E to deliver him the residue of said hay, hath not delivered the residue of said hay, or any part thereof, but refused, and still refuses so to do; by reason whereof, the plaintiff hath been obliged to buy another large quantity of other hay to answer his occasions and use, to wit, twenty loads of other hay, at a great price, to wit, at the price of \$20, &c.

Promise in consideration plaintiff had bought &c.

SECOND COUNT. In consideration the plaintiff *had* bought &c. [as before, omitting the averment between brackets.]

Mutual promise in consideration of an agreement.

THIRD COUNT. And for that whereas the said E, on &c., at &c., bargained and sold to the plaintiff, and the plaintiff then and there bought of the said E, a certain other quantity of hay, to wit, fifty-nine other loads of hay, at the rate of \$15 by the load thereof, to be therefor paid by

the plaintiff to the said E; and it was then and there agreed by the said E and the plaintiff, that the said E should deliver to the plaintiff the said hay last mentioned, in such portions and quantities as the plaintiff should, from time to time, have occasion for and need of, upon request, he, the plaintiff, paying the said E therefor at the rate aforesaid by the load, for every load thereof, upon the delivery thereof as aforesaid; and it being so agreed by the plaintiff and the said E, as last aforesaid, the said E, at the time and place last mentioned, in consideration that the plaintiff, at the special request of the said E, had, then and there, promised the said E to perform and fulfil the said agreement, in all things on his part to be performed and fulfilled, promised the plaintiff to perform and fulfil the said agreement in all things, on his, the said E's part, to be performed and fulfilled. And the plaintiff avers, that although in pursuance of said agreement last mentioned, the said E hath delivered to the plaintiff, at his request, a certain portion of the last mentioned hay, to wit, twenty other loads thereof, and although the plaintiff, at all times hitherto, hath been, and still is, ready and willing to pay the said E, at the rate last aforesaid, for such portions and quantities of the last mentioned hay, as should be delivered to him as last aforesaid, upon delivery thereof, and although the plaintiff hath had great need of and occasion for the residue of the said last mentioned hay; yet the said E, though on &c., at &c., and often afterwards thereto requested, hath not delivered the residue of the last mentioned hay, or any part thereof, but hath wholly refused and still refuses so to do.

Promise generally to deliver in consideration plaintiff had bought.

FOURTH COUNT. And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said E, had, then and there, bought of the said E a certain other large quantity of hay, at the rate of \$15 by the load for every load thereof, the said E promised the plaintiff to deliver him the said last mentioned hay, so bought of him, the said E, as last aforesaid, upon request; and the plaintiff avers, that, *although he hath been always ready and willing to pay the said E for the last mentioned hay, at the rate and price last mentioned, for such quantities as should be delivered to him, as last aforesaid, upon the delivery thereof, and although he did afterwards, to wit, on &c., at &c. and on divers other days and times, between that day and the day*

of the purchase of this writ, request the said E to deliver the said hay last mentioned, to him, the plaintiff; yet the said E hath not delivered the said last mentioned hay, but wholly refused and yet refuses so to do. 2 *Went. Pl.* 175.

CROMPTON.

NOTE. The averment in italics is not in *Wentworth*, and *quære*, if it be not necessary according to the before mentioned case of *Rawson v. Johnson*, 1 *East's Rep.* 203. (MSS.)

For not delivering a cargo of coals.

For that on &c., at &c., in consideration that the plaintiff, at the special request of the said E, had bought of the said E a cargo of coals, of and in a certain ship called &c., whereof the said E was then master, at the rate and price of \$4 per chaldron, for every chaldron thereof; and the plaintiff, at the like request of the said E, had then and there promised the said E to pay him the said rate and price for the same, the said E promised the plaintiff to deliver him the said cargo of coals; and the plaintiff in fact says, that the said cargo of coals so by him bought of the said E, as aforesaid, then and there contained three hundred chaldron of coals, of which the said E then and there had notice; and although the plaintiff hath always been ready and willing, and offered the said E to pay him the rate and price aforesaid, on delivery of the said coals; yet the said E hath not delivered to the plaintiff, the said cargo of coals, nor any part thereof, though afterwards, to wit, on &c., at &c., and often since thereto requested, but refused and yet refuses to deliver the same to him.

In consideration plaintiff had promised to pay after a certain rate; mutual promises.

SECOND COUNT. And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said E, hath then and there promised the said E, to pay him the rate and price of \$4 per chaldron for every chaldron of another cargo of coals of the said E, the said E promised the plaintiff to deliver him the said cargo last mentioned; and the plaintiff in fact says, that the said cargo last mentioned, then and there contained another three hundred chaldron of coals; and though the plaintiff hath always been ready and willing, and often offered the said E to pay him the rate and price last aforesaid, on delivery of the said cargo of coals last mentioned, yet the said E hath not yet delivered the

said last cargo of coals, or any part thereof, to the plaintiff, though the said E was afterwards, to wit, on &c., at &c., and often afterwards requested, by the plaintiff thereto, but refused and yet refuses so to do.

In consideration plaintiff would pay at a certain rate, and a tender averred.

THIRD COUNT. And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said E, would pay to the said E the rate and price of \$4 per chaldron, for every chaldron of another cargo of coals of the said E, upon the delivery thereof to the plaintiff, the said E promised the plaintiff to deliver him the said cargo last mentioned; and the plaintiff in fact saith, that he afterwards, to wit, on &c., at &c., tendered and offered to the said E to pay him the rate and price last above mentioned, and then and there requested the said E to deliver to him, the plaintiff, the cargo last above mentioned, which said cargo then and there amounted to another three hundred chaldron of coals; yet the said E, though often requested, hath not yet delivered to the plaintiff the said cargo last above mentioned, nor any part thereof, but refused and yet refuses so to do.

In consideration plaintiff had bought and promised to pay on delivery.

FOURTH COUNT. And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said E, had bought of the said E another cargo of coals at the rate and price of \$4 per chaldron, for every chaldron thereof, and had then and there promised the said E, to pay him the said rate and price for the same, the said E promised the plaintiff to deliver him the said cargo of coals, last above mentioned, upon request; and the plaintiff in fact says, that the said cargo of coals last above mentioned, contained other three hundred chaldron of coals, of which the said E then and there had notice; and though the plaintiff hath always been ready and willing, and often offered the said E to pay him the rate and price last above mentioned on delivery of the said cargo last mentioned; yet the said E hath not yet delivered to the plaintiff the said last mentioned cargo of coals, though the said E afterwards, to wit, on &c., and often afterwards, at &c., was thereto requested by the plaintiff, but refused and still refuses to deliver the same.

Beere v. Hall, Plead. Assist. 283.

For not delivering hops on or before a certain time; earnest being given, and mutual promises averred.

For that whereas, on &c., at &c., it was agreed between the said E and the plaintiffs, in the manner following, to wit, that the said E should deliver to the plaintiffs sixteen bags of good, new hops, of the then next growth, good brewers' ware, at \$6 by the hundred weight, and that they should be delivered *on or before* the 25th of December, then next following; and thereupon, in consideration that the plaintiffs had paid to the said E \$1, in part payment thereof, and then and there, at the special request of the said E, promised the said E to perform the agreement aforesaid in all things on the part of them, the plaintiffs, to be performed, the said E then and there promised the plaintiffs, that he would faithfully perform the agreement aforesaid, in all things, on his part to be performed; yet the said E hath not delivered the aforesaid sixteen bags of hops or any parcel thereof, on or before the said 25th day of December, or at any time afterwards until this time, to the plaintiffs, or either of them, but hitherto hath refused and still refuses so to do. *Freeman et al. v. Barnard et al.* 3 L. Raym. 245.

NOTE. If a promise be to deliver goods, on or before the 20th of January, and the breach assigned be, that he did not deliver *upon the 20th of January*, it is good, at least after verdict; for, delivery at a day precedent will not be good without notice; and a tender before the last day will not excuse from making a tender or delivery on the last day, according to Cro. Eliz. 14, 73, *per* Holt; 1 Salk. 140; Com. 89; 1 L. Raym. 620. *Contra* on an award. 2 Lev. 293. (MSS.)

For not delivering ten brushes on or before a certain day, earnest being paid.

For that, on &c., at &c., the said E sold the plaintiff ten brushes for 2, then and there in hand by him paid to the said E, and for \$3, to be paid to the said E, upon the delivery thereof; and the said E then and there, in consideration thereof, and that the plaintiff, at the special request of the said E, then and there promised to pay the said E, the said \$3, on the delivery of the said brushes, promised the plaintiff to deliver him the said ten brushes, *on or before* the first day of May, then next ensuing, but now past. Yet though requested, the said E did not deliver the said ten brushes to the plaintiff, on or before the first day of May, or afterwards, but refused and still refuses so to do.

For not selling and delivering tallow upon importation; pursuant to contract, altered afterwards as to mode of payment.

For that whereas, on &c., at &c., an importation of white Russia tallow candles being expected to be made into the United States, whereby the market price of such commodity was expected to be altered, the said E, by one W, his broker or agent in that behalf, and by, and in the name of the said E, then and there agreed to sell the plaintiffs, who then and there agreed to buy, of the said E, on arrival, to wit, on the arrival of such expected importation of tallow, as aforesaid, one hundred casks of new merchantable white Russia tallow candles, at the rate and upon the terms following, to wit, at the rate of \$10 per hundred weight, with customary allowances for taxes and defects, to be taken at the landing weights, and to be paid for by the acceptance of the plaintiffs, at six months from delivery; and, in case any duty should be imposed on tallow, before arrival, to wit, before the arrival of such expected importation as aforesaid, the said duty to be paid by the plaintiffs; and the plaintiffs in fact further say, that the said E, having so agreed to sell them such tallow as aforesaid, at the rate and upon the terms aforesaid, and being desirous of being paid for the same in ready money, instead of by such acceptance of the plaintiffs as aforesaid, it was afterwards, and before the delivery of the said tallow, or any part thereof, unto the plaintiffs, to wit, on &c., agreed between the plaintiffs and the said E, that the said tallow should be paid for in ready money, instead of by such acceptance as aforesaid, on the plaintiffs' being allowed at the rate of \$3 by the hundred, discount; and thereupon, at the time and place last mentioned, in consideration of such several contracts for the said tallow, so agreed to be sold to the plaintiffs as aforesaid, and also in consideration that the plaintiffs, at the special request of the said E, promised him to take and buy such tallow of the said E, according to the terms of the said original agreement for the same, except as to the mode of payment for the same, and, as to such payment, to make the same in ready money, according to the terms of said second agreement respecting the said tallow instead of by such acceptance as aforesaid, the said E promised the plaintiffs to sell and deliver to them the said one hundred casks of tallow, according to the terms of the said original agreement, except as to the mode of payment, and as to that, according to the said second agreement respecting said tallow; and

the plaintiffs in fact say, that although the said importation of tallow hath long since arrived in these States, to wit, &c.; and although the said E might and could thereupon have delivered the said one hundred casks of said tallow, according to the terms aforesaid; and although the said E did afterwards, to wit, on &c., sell and deliver the plaintiffs a part, to wit, fifty of the one hundred casks of said tallow, and was thereupon paid by the plaintiffs for the same at the rate aforesaid in ready money; and although the plaintiffs were then willing and ready, and offered to buy of and receive from the said E, the residue of the said one hundred casks of said tallow, and to pay for the same according to the rate, and in manner last aforesaid, and then and there requested the said E to deliver them the same; yet the said E hath never delivered the said residue to the plaintiffs, but refused and still refuses so to do; whereby the plaintiffs have suffered great loss, by reason of a rise in the market price, and have been obliged to purchase other tallow in lieu thereof, at a great and advanced price, to answer divers contracts made by them for such tallow as aforesaid, &c. *2 Went. Plead.* 187.

For not delivering residue of wheat, the whole being paid for on the delivery of part.

For that whereas the plaintiff, on &c., at &c., had bought of the said T, ten sacks of wheat flour, computing five bushels to the sack, in the whole amounting to fifty bushels, at the rate and price of 5 dollars a sack for every sack, to be therefor paid by the plaintiff to the said T, and then and there promised the said T to pay him therefor the rate and price aforesaid; and, in consideration thereof, the said T then and there promised the plaintiff to deliver to him the same quantity of wheat flour; and although the said T, on &c., at &c., in prosecution of the said promise of the said T, delivered the plaintiff forty-five bushels of wheat flour, in part of said fifty bushels of wheat flour, and although the plaintiff had paid the said T the rate or price aforesaid for the whole fifty bushels of the said wheat flour, to be delivered to the plaintiff as aforesaid; yet the said T, the residue of the said fifty bushels of wheat flour, to wit, five bushels thereof, hath not delivered to the plaintiff, although to do this the said T, afterwards, on &c., at &c., and often afterwards, was requested, but wholly refused, and still refuses so to do. *Plead. Assist.* 135. **BOOTLE.**

For delivering hops of next year's growth, part payment after delivery.

1st. COUNT.—*In consideration of agreement and mutual promises.*

For that whereas, on &c., at &c., at the special request of the said E, it was agreed between the plaintiff and the said E, in manner following, to wit; the said E, in consideration of \$1, then paid him by the plaintiff, and of \$200, to be paid him by the plaintiff on the tenth day of November, then next ensuing, sold the plaintiff one ton weight of the said E's best hops, which the said E should have grown on the hop grounds of the said E, which he then occupied in &c., the then next ensuing year, and which should be of the gathering of his, the said E's, best hops, then growing, and that the said E should deliver the same to the plaintiff, at his, the said E's, house, in &c., on or before the first day of November then next ensuing, and that the said hops should be cured in the best manner the said E could, and as he usually cured his hops, and that in case said E should not have a ton weight of the bright or best hops, growing in &c. and in manner aforesaid, then all such hops, whether bright or brown, should be for and towards making up the said ton of hops so sold, at and after the rate and price above mentioned, and so, in proportion, in case there should not be a ton weight thereof grown, and that the said E should give the plaintiff three days' notice of weighing the said hops; and thereupon on the day and year first mentioned, at &c., in consideration that the plaintiff, at the special request of the said E, promised the said E well and truly to perform the said agreement, in all things on his part to be performed, the said E then and there promised the plaintiff, well and truly to perform the said agreement, in all things on his part to be performed; and the plaintiff in fact says, that the said E, in the year next ensuing, after the said agreement made as aforesaid, and before the time mentioned for the delivery of the said hops, to wit, on &c., had a ton weight of his, the said E's, best hops, grown on his hop grounds, occupied by him in &c. whereof the said E then and there had notice.

In consideration plaintiff had bought &c. with statement of special circumstances.

SECOND COUNT. And whereas, on &c., at &c., in consideration that the plaintiff, at the like request of said T, had bought of the said T another ton weight of the said T's

best hops, which the said T should have grown on his hop grounds in &c., the then next ensuing year, and which should be of the first gathering of his best hops then growing, to be cured by the said T in the best manner he could, and as he usually cured such his best hops, and to be delivered by said T to the plaintiff, at the said T's dwelling-house, in &c., on or before the first day of November, then next ensuing, for one dollar, to be paid in hand by the plaintiff, to the said T, and of two hundred dollars more, to be paid by the plaintiff to the said T, on the 10th day of November next ensuing, for the same; but, if the said T should not have a ton weight of the bright or best hops, grown in &c., in manner aforesaid, in the said next ensuing year, then all such hops as should be then grown there, whether bright or brown, should be for and towards making up the said ton of hops last above mentioned, to be sold at and after the rate and price last above mentioned, and so, in proportion, in case there should not be a ton weight thereof grown, and the said T to give the plaintiff three days' notice of weighing of the said hops last mentioned, at &c., and in consideration that the plaintiff, at the like request of the said T, had paid the said T the said one dollar last mentioned, and then and there promised the said T to pay him the rest of the said rate last mentioned, in manner last mentioned, the said T promised the plaintiff to deliver him the said hops last mentioned, in manner last mentioned, on or before the said first day of November, then next ensuing; and the plaintiff, in fact saith, that the said T in the year then next ensuing, and before the said time last mentioned, to wit, on &c., at &c., had another ton weight of his, the said T's, best hops, grown on his said hop grounds, in &c., whereof the said T then and there had notice:

In consideration plaintiff had bought hops and paid earnest, and had promised to pay; defendant promised; special circumstances omitted.

THIRD COUNT. And whereas, on &c., at &c., in consideration that the plaintiff, at the like request of the said T, had bought of the said T another ton weight of hops, which the said T should have grown on his hop grounds, in &c., the then next ensuing year, but if there should not be a ton weight thereof grown there in that year, then so much thereof as should be grown there, to be cured and delivered by the said T to the plaintiff, at the said T's dwellinghouse, in &c., on or before the first day of November, then next en-

suings, and after the rate and price of two hundred and one dollars, to be paid by the plaintiff to the said T for the same; one dollar in hand, and the residue thereof on the tenth day of November, then next ensuing, and the plaintiff had, at the like request of the said T, then and there paid him the said one dollar last mentioned, and had promised the said T to pay him the rest of the said rate last mentioned, in manner aforesaid, the said T promised the plaintiff to cure and deliver the said hops last mentioned to him, at the said T's dwellinghouse, in &c., on or before the said tenth day of November, then next ensuing; and the plaintiff in fact saith, that the said T, in the then next ensuing year, and before the said time for the delivery of the hops last mentioned, to wit on &c., at &c., had another ton weight of hops grown on his said hop grounds, at &c. whereof the said T then and there had notice.

In consideration plaintiff had bought &c. (as before) defendant promised to deliver hops of the first gathering.

FOURTH COUNT. And whereas, on &c., at &c., in consideration that the plaintiff, at the like request of the said R. had bought of the said R another ton weight of his, the said R's, best hops, of the first gathering, which the said R should have grown in his hop grounds, in &c., the then next ensuing year, for another large sum of money, to wit, two hundred and one dollars, to be paid for the same in manner following; and the plaintiff at the like request of the said R, had then and there paid the said R, one dollar, part thereof, and promised the plaintiff, to pay him the residue thereof on the tenth day of November, then next ensuing, the said R promised the plaintiff to deliver him the said hops last mentioned, on or before the first day of November, then next ensuing, and the plaintiff avers, that the said R in the year then next ensuing, and before the time for the delivery of the said hops last mentioned, to wit, on &c., at &c., had another ton weight of his best hops of the first gathering on his said hop grounds, at &c., whereof the said R then and there had notice.

Yet the said R hath not yet delivered the plaintiff the said several quantities of hops, or any part thereof, though on the said tenth day of November, next ensuing, the said agreements, at &c., thereto by the plaintiff requested, and though the plaintiff then and there, at the dwelling of the said R, in &c., was ready and willing to have received the

same, but the said R hath hitherto refused and still refuses to deliver the same to him. *Plead. Assist.* 233.

For not delivering two cows, earnest being given, and residue payable on delivery.

For that the plaintiff, on &c., at &c., at the special request of the said R, bought of the said R two cows, at and for a certain rate or price, viz. for the sum of fifty dollars, whereof the plaintiff, then and there in hand, paid the said R one dollar; and in consideration thereof, the said R then and there promised the plaintiff, that he would deliver him the said cows on the then next day, at and for the rate and price aforesaid; and although the plaintiff was on the morrow of the said — day of &c., ready to take and accept the said cows, so sold to him, as aforesaid, at the price and rate aforesaid, and was ready and willing, and offered to pay the residue of the said price or rate thereof to the said R, and then and there requested the said R to deliver him the said cows; yet the said R did not deliver the plaintiff the said cows, but wholly refused and still refuses so to do. 2 *Went. Plead.* 138. HARDCASTLE.

For not delivering the residue of certain calves, to be delivered weekly.

1ST. COUNT.—*In consideration plaintiff has bought and promised to pay.*

For that whereas the plaintiff, on &c., at &c., at the special request of the said R, bought of the said R fifteen calves, at the rate of three dollars, to be paid the said R for each and every of the said calves, on the delivery thereof, and then and there promised the said R to pay him the sum of three dollars for each and every of the said calves on delivery thereof as aforesaid; and in consideration thereof, the said R then and there promised the plaintiff to deliver him the said fifteen calves, in manner following, to wit; two of the said calves in each of the first six weeks, and the remaining three on the seventh week next ensuing the said sale thereof; and the plaintiff avers, that although the said R, in the first week after the said sale, to wit, &c., delivered to the plaintiff two of the said calves, and in the second week after the said sale, to wit, &c., delivered one other of the said calves, in part performance of his said promise, which the plaintiff paid for according to the rate aforesaid, on delivery; and, although the said seven weeks from the said sale of the said calves, and wherein the said calves should have been delivered to the

plaintiff, have long since elapsed, and although the plaintiff, within the said seven weeks, duly tendered himself and offered to receive of the said R, and then and there requested the said R to deliver him the rest of the said calves and then and there tendered and offered to pay the said R the sum of three dollars, for each and every of the residue of the said calves, on delivery; and although the plaintiff hath always from thence, hitherto been ready and willing to receive the residue of the said calves, and to pay the said R for the same, at the rate aforesaid, to wit, at &c.; yet the said R, when requested as aforesaid, did not deliver, nor hath yet delivered the residue of the said calves to the plaintiff, but wholly refused and still refuses so to do. 2 *Went. Plead.* 131. **BARROW.**

In consideration plaintiff had bought &c., plaintiff always ready &c.

SECOND COUNT. For that, on &c., at &c., in consideration that the plaintiff had bought of the said T other fifteen calves, at the price of three dollars for every of the said calves, to be paid therefor on the delivery thereof, *the said calves to be delivered in manner following, to wit: two of the said calves in each of the first six weeks, and the remaining three on the seventh week next ensuing the said sale thereof,* promised the plaintiff to deliver him two of the said calves in each of the first six weeks, and the remaining three on the seventh week next ensuing the said sale thereof, and the plaintiff avers that he always from the time of making said sale, for the said seven weeks next ensuing said sale, and afterwards, was ready and willing to receive the said calves, according to the agreement aforesaid, and was ready to pay for every thereof on delivery, according to the rate aforesaid; yet the said T, though requested, *within the said seven weeks, to wit, on the last day thereof, and afterwards,* never delivered the said fifteen calves to the plaintiff, within the said seven weeks, or at any time before or since, *but only a part thereof, to wit, three calves, for which the plaintiff paid the said T according to the rate aforesaid, on delivery,* but the residue of the same calves the said T wholly refused, and still refuses to deliver to the plaintiff.

NOTE. Add a third count, omitting the parts in italics; and a fourth count upon promise to deliver them in a reasonable time; so that some count may tally with the evidence. (MSS.)

For not delivering residue of certain heifers to be delivered weekly and paid for proportionably.

1st. COURT.—*In consideration of agreement; mutual promises, part delivery and special request averred.*

For that whereas, on &c., at &c., the plaintiff bought of the said D, six heifers, at the rate and price of \$96, to be therefor paid by the plaintiff to the said D, the said heifers to be delivered to the plaintiff, two thereof weekly from that time, until the said six heifers should be all delivered; and it was then and there agreed between the said D and the plaintiff, that the plaintiff should take and fetch away from the said D, two of the said six heifers weekly, from that time until the plaintiff should have fetched away the said six heifers, and that the said D should deliver to the plaintiff the said heifers, viz. two thereof weekly, when the plaintiff should come for the same, and that the plaintiff should pay the said price of the said heifers by proportionable payments, as he should fetch away the same; and the said agreement being so made, the said D then and there, in consideration that the plaintiff then and there promised the said D to perform all the said agreement on his part to be performed, promised the plaintiff to perform all the said agreement on his, the said D's, part to be performed; and although the plaintiff, on &c., in the week next after making the said agreement, at &c., paid the said D \$32, in part payment of the said rate and price, to be therefor paid as aforesaid, and then and there fetched away two of the said heifers, which the said D then and there delivered him, and although the plaintiff afterwards, on &c., in the second week next after making the said agreement, at &c., paid to the said D \$32 more, in further part payment of the said price to be paid, as aforesaid, and then and there fetched away two more of the said six heifers, which the said D then and there delivered; and although the plaintiff, on the last day of the third week, next after making the said agreement, to wit, on &c., at &c., went to the said D to fetch away, and was then and there ready to fetch away the remaining two heifers, and to pay, and offered to pay the said D the residue of the rate aforesaid, on the delivery of the said remaining two heifers to the plaintiff, and then and there requested the said D thereto; yet the said D did not then, or at any other time whatsoever, deliver the said two heifers, or either of them to the plaintiff, but wholly refused and still refuses so to do. *Morg. Prec.* 165.

In consideration plaintiff had bought &c.; part delivery and special request averred.

SECOND COUNT. For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said T, had then and there bought of the said T other six heifers, to be delivered by the said T to the plaintiff, *who should come and fetch away the same, in manner following, to wit; two every week from that time until the whole should be delivered,* at and for the price of \$96, to be therefor paid by the plaintiff, in proportional payments, as the plaintiff should fetch away the same, the said T promised the plaintiff to deliver the last mentioned heifers, two every week, from that time, as the plaintiff should come to fetch away the same, until the whole should be delivered; and the plaintiff avers, that though the said T, in part performance of the agreement last mentioned, did deliver to the plaintiff four of the last mentioned six heifers, *to wit, two weekly, for the two first weeks, next after the making of the last mentioned agreement,* which were paid for by the plaintiff on delivery, according to the rate last mentioned; and though the plaintiff, on the last day of the third week, next after the making the agreement last mentioned, *to wit, on &c., at &c.,* went to the said T to fetch away, and was then and there ready and willing to fetch away the remaining two of the heifers last mentioned, and to pay, and offered to pay the said T the residue of the rate last mentioned, to wit, \$32 on the delivery thereof, and then and there requested the said T thereto; yet the said T did not then or at any time before or since, deliver the plaintiff the remaining two of the heifers last mentioned, or any part thereof, but then refused and still refuses so to do.

NOTE. Add a third count, omitting the parts in italics; and a fourth, as on a *general payment* on delivery; a fifth, as for heifers to be delivered on request; and a sixth, in consideration plaintiff had bought &c., to be paid for on delivery, and *had promised to pay* therefor in proportional payments, &c., defendant promised to deliver upon request; so that the evidence may comport with some of the counts. (MSS.)

For other declarations under this head, see Plead. Assist. 61.

For not delivering linen in exchange for buckles.

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said T, would sell and deliver the said T a certain large quantity of buckles, to wit, twenty pair of buckles of great value, to wit, of the value

of \$10, the said T promised the plaintiff to deliver him, for and in exchange for the same buckles, a certain large quantity of Irish linen, of great value, to wit, of other \$10, and the plaintiff, in fact says, that he, relying on the said promise of the said T, did there afterwards on the same day, sell and deliver to the said T the said buckles; yet the said T hath not yet delivered the said Irish linen, or any part thereof, to the plaintiff, though then and there requested thereto, but wholly refused so to do. 2 *Went.* 191.

GRAHAM.

NOTE. Add second count, in consideration plaintiff had sold and delivered, leaving out the averment. Also add counts for goods sold and delivered and quantum meruit thereon.

For not delivering mare in exchange for plaintiff's cows, the said mare being a part only of the exchange.

For that whereas, on &c., at &c., the plaintiff was lawfully possessed of divers, to wit, seven cows, and the said T was then and there possessed of a certain heifer and a certain mare, and being so possessed, in consideration that the plaintiff, at the special request of the said T, had then and there agreed with the said T to exchange with the said T the said cows of the plaintiff for the said heifer and mare of the said T, and a certain sum of money, to wit, &c., to be paid by said T to the plaintiff, the said T then and there promised the plaintiff, to deliver him the said heifer and mare, and also to pay him the said sum &c., by way of, and in exchange for the said cows of the plaintiff; and the plaintiff avers, that thereafterwards on the same day, and in exchange for the said mare and heifer, and sum of &c., so agreed to be paid and delivered, as aforesaid, he did deliver to the said T the said cows, which the said T then and there accordingly had and received; and the plaintiff further says, that although the said T hath delivered his said heifer to the plaintiff, in part of said exchange, yet the said T hath not yet delivered to the plaintiff, by way of exchange, or otherwise, the said mare, nor hath he ever paid the said sum of &c., so by him agreed to be paid to the plaintiff, but hath wholly refused and still refuses so to do. 2 *Went.* 221.

LAWES.

NOTE. Add counts for cattle sold and delivered, bargained and sold &c., for work and labor of plaintiff's mare, for money had and received &c.

For not delivering a mare according to bargain of exchange; earnest being paid.

For that whereas, on &c. at &c., it was agreed between the plaintiff and the said D, that the plaintiff should give the said D a colt, in exchange for the mare of the said D, and should pay the said D ten dollars to boot, on the 7th day of December, then next ensuing; and it was then and there further agreed by the plaintiff and the said D, that the plaintiff should keep the said colt until the 29th day of September, then next ensuing, in consideration whereof, and that the plaintiff then and there promised the said D, to perform faithfully all the said agreement on his part to be performed, the said D promised the plaintiff to perform faithfully all the said agreement on his, the said D's, part to be performed; and the said D then and there, to make the said agreement the more firm and binding, paid the plaintiff one cent in earnest of the said bargain; and the plaintiff in fact says, that, in pursuance of said agreement, he kept the said colt until the said 29th day of September; and the plaintiff further avers, that he was always ready and willing, and frequently offered to pay the said D the said ten dollars, and requested the said D to accept the same, but the said D would not receive the said money of the plaintiff, and the said D hath not delivered the said mare to the plaintiff, though on &c., at &c., thereto requested, but wholly refused and still refuses so to do.

NOTE. This declaration is founded on the case of *Bach v. Owen*, 5 T. R. 409, where the averments were similar, excepting a *special* request to deliver was not alleged as here, and it was attempted to quash the declaration on demurrer, because the plaintiff had not averred that he had delivered or offered to deliver the colt to the defendant. But, per Buller, "There is no foundation for the objection; the payment of the halfpenny vested the property of the colt in the defendant, and therefore it was unnecessary for the plaintiff to show that he had tendered the colt to the defendant. But the plaintiff should have averred a *special* request to deliver the mare, and the want thereof is a substantial defect." *Quære* of the effect of earnest, and see *ante*. (MSS.)

For not delivering plaintiff a vessel which defendant built for plaintiff according to agreement, &c.

For that, at &c., on &c., the said E, in consideration of the promise and agreement of the said plaintiffs hereinafter mentioned, agreed with and promised the said plaintiffs, that he would build for, and deliver to them, a certain vessel of the following dimensions and description, to wit: sixty-three

feet keel; twenty-three feet beam; eleven feet hold; payable for nine and a half feet hold, with four beams below the upper deck; two of them to the foremast, and two of them to the mainmast, with partners to wedge the mast in; the quarter deck to run over the main deck about eight feet, and to come just short of the mainmast; the cabin floor to be two and a half or three feet below the main deck, with proper beams and knees, and the waist to be eighteen inches at the midship and thirty inches forward; and the said vessel to be built all of white oak, above the floor timbers, unless the said plaintiffs should wish and propose any other wood for top timbers and plank, in which case the said E promised to allow the price of white oak therefor; that the said E would caulk and grave the said vessel, fit for sea, the said plaintiffs finding oakum and naval stores; and that the said E would do the iron work for the hull of the said vessel, and for the rigging thereof, at twenty shillings, of the value of \$3,334, by the hundred weight, the said iron work to be all weighed, and no hand work charged; and that he, the said E, should clear the said vessel of chips, stop the holes in her, and would launch the said vessel by the &c. day of &c., and would deliver the said vessel to the said plaintiffs, in a reasonable time after the said vessel should be launched, as aforesaid and not charge any thing for launching wedges, raising bolts, or rimming irons; in consideration whereof, the said plaintiffs then and there promised and agreed with the said E, to find oakum and naval stores for caulking and graving the said vessel, as aforesaid, to find iron for the iron work aforesaid, to pay the said E twenty shillings, of the value abovementioned, for every hundred weight of iron work done by the said E, as aforesaid, to pay and deliver to the said E, one barrel of West India rum for clearing the chips, stopping the holes and launching the said vessel, as aforesaid; that they would pay to the said E, for putting in the four beams below to wedge the mast in, as an extra bill, what the said E should reasonably deserve to have therefor, and would pay to the said E, for the said vessel, the sum of &c. by the ton, for every ton the said vessel should tonnage; one quarter part thereof in English dry goods, one quarter part thereof in iron and provisions, and one half part thereof in cash; the first and second payments to be at the customary cash price; all the payments aforesaid, to be made by the said plaintiffs, on the delivery of the said vessel, as aforesaid. Now the said plaintiffs aver,

that they reasonably delivered and supplied the said E, with all the oakum, and naval stores and iron, to be by them supplied, as aforesaid; that they have been at all times, and are now ready to do and perform every thing on their part, above to be done and performed, and that relying on the promises of the said E, they have in fact, at the said E's request, advanced, paid and delivered to him on account, and towards payment of said vessel, \$— in cash, \$— in iron, \$— in goods and provisions, according to the account hereto annexed, and also have been at the expense of \$— in caulking and in joiner's work, in butt bolting and in lumber nails, and in painting of and for the said vessel, and upon and in assisting to launch the said vessel; and also relying upon the promises aforesaid of the said E, they have procured all the masts, spars, and yards, all the rigging and sails, necessary for masting, and rigging, and clothing the said vessel, and the lead-work, and windlass, and blocks for her use; yet, though the said vessel has long been launched, to wit, ever since &c., and though he, the said E, has had a reasonable time since the launching of the said vessel, as aforesaid, to deliver her to the said plaintiffs, and though they have been always ready to receive the said vessel, and have requested the said E to deliver the said vessel to them, the said E, not regarding his promises, as aforesaid, but intending to injure and defraud the said plaintiffs in this behalf, hath refused and still refuses to deliver the said vessel to them, and hath altogether broken his promises aforesaid.

T. PARSONS.

By administrator, for not paying the deceased, nor the plaintiff a sum of money agreeably to contract to pay for specific articles at an agreed rate.

For that the said D and E, at &c., on &c., agreed with the said A A, then living, for cordage, cables, and canvas for the sloop I, of which the said D and E were the owners, cordage to be at \$— per cwt., Russia duck, number one, to be at \$— per piece, to pay in wood, staves, or bark, and, if not paid in six months, then to pay interest at six per cent. per annum, till paid, upon which agreement, and in consideration thereof, the said A A then and there sold and delivered to the said D and E the duck, cables and cordage in the account annexed mentioned, amounting, according to the prices by said agreement, to the sum of &c. And the said G avers, that the said A A, in his lifetime, was always ready to receive the said boards, staves or bark, in payment

thereof, to wit, at said &c. Yet the said D and E, or either of them, have not paid the same sum, or any part thereof, to the said A A, in his lifetime, or since his death, to the said plaintiff, or any other administrator of the said A A's estate, although said term of six months has long since past, and although requested to pay the same. *C. C. P. Esscx*, 1792, *Tracy v. Jewett*. S. SEWALL.

2. *On Notes payable in specific articles, various memoranda in Writing, Bills of Lading, &c.*

Holder v. Maker, on note payable in specific articles.

For that the said E, at &c., on &c., by his note of hand of that date, for value received, promised the plaintiff to pay and deliver him, or his order &c., gallons of New England rum, at &c., *on &c. or before &c.*, then next ensuing, and now past. And the plaintiff avers, that the said rum, at the said time and place of delivery, was worth — for every gallon, and that he was then and there ready to receive the same; yet the said D, though then and there requested, never delivered the same rum, or any part thereof to the plaintiff, but wholly refuses so to do.

Another.

For that the said D, at a place called P, *viz.*, at S aforesaid, on &c., by his note under his hand of that date, for value received, promised the plaintiff to pay and deliver him, at his wharf in said P &c. pipes of the best Madeira wine, of the value of — as the plaintiff avers, in &c. months from the date of said note, which are long since passed; yet the said D, though requested, did not deliver said pipes of wine to the plaintiff, according to his promise aforesaid, and has ever since unjustly refused the same. T. PARSONS.

Another.

For that the said D, on &c., at &c., by his note or memorandum in writing, of that date, by him subscribed, for value received, promised the plaintiff to pay him or his order, one full welted saddle, such as he, the said D, did then sell at \$—, on demand. And the plaintiff avers, that he, on &c., at &c., was ready to receive, and did then and there specially request the said D, to deliver or pay him the said saddle, of the value aforesaid, and that the said D, though so specially requested, and though often otherwise requested, hath never paid nor delivered &c. S. PUTNAM.

Holder v. Maker, on note payable in hats.

For that the said E, at &c., on &c., by his note and memorandum in writing, of that date, by him signed, for value received, promised the said plaintiff to pay and deliver to him, or to his order, three hundred and twenty-two good merchantable hats, of the value of &c., viz. seventy-five good furred hats, such as Mr. F. L. sold at that date for \$3 each, one hundred and ten wool hats, such as the said L then sold for \$1.25 each, and one hundred and thirty-seven boys' wool hats, such as the said L, then at said date, sold for 75 cts. each; of the size of boys' hats, from a boy six years' old, to a boy's hat of fourteen years' old, and an equal number of every size; *one eighth part of all* the hats, and of all the sorts of the above different prized hats, to be paid and delivered every three months, computing from said date, till the whole should be paid and delivered to the said plaintiff, or his order, he to take said hats at said E's shop in &c., if they should be ready at three months' end, and if they should not be ready at the three months' end, the said E to pay interest money for the hats, that should not be ready, till he, at his expense, got them up to B to the said E; and the quality of said hats to be left to S. H. and son, or to said L, to be ascertained, if they were, or should be, as good, as said L sold, at the date of the said writing, at the above prices; yet, though the said plaintiff, at the expiration of three months from the date of said writing, viz. on &c., at said shop, was ready to receive one eighth part of all the said hats, and of all the sorts of the above different prized hats, and requested the said E to pay and deliver such eighth part to him, the said plaintiff, he, the said E, refused so to do, [nor hath the said E ever got the said eighth part of said hats up to B to said plaintiff, although requested so to do, to wit, at &c., on &c., but he, the said E, refused, and hath always refused, to deliver any part of said hats.]

SECOND COUNT was the same, except in omitting the part between brackets. THIRD COUNT declared for "one eighth of the hats," without stating any part respecting the other payments.

Note payable in fish.

For that the said E, at &c., on &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff, to pay him or his order, sixteen and two

thirds quintals of Jamaica codfish, of the value of &c. within eight days from the date thereof, with interest ; and the plaintiff avers, that he was ready at P aforesaid to receive the said fish, and there, within the said eight days, viz. on &c., requested the said E to deliver the same ; but the said E did not deliver the fish aforesaid, neither hath he since delivered it, but still neglects and refuses so to do, to the damage &c. *Leverett v. Lock, Essex, 1794. T. PARSONS.*

Note payable in wood, staves, or bark. Administrator v. Makers.

For that the said T and E, at &c. on &c., agreed with the said A, then living, for cordage, cables, and canvas, for the sloop J, of which the said T and E were then owners, cordage to be at \$— per cwt., Russia duck, number one, to be at \$— per piece, to pay in wood, staves, or bark, and if not paid in &c., months, then to pay interest at six per cent. per annum till paid ; upon which agreement and in consideration thereof, the said A then and there, sold and delivered to the said T and E, the duck, cables and cordage, in the account annexed mentioned, amounting, according to the prices by said agreement, to the sum of &c. ; and the plaintiff avers, that the said A, in his lifetime, was always ready to receive the said boards, staves, or bark, in payment thereof, to wit, at &c. ; yet the said T and E, or either of them have not paid the same sum, or any part thereof to the said A in his lifetime, or, since his death, to the said plaintiff, or any other administrator of the said A's estate, although the said term of &c. months has long since past, and although requested to pay the same ; to the damage, &c.

Note payable in boards.

For that the said E, on &c., at &c., having received to his own use, and at his request, of the plaintiff, the goods and moneys mentioned in the account annexed, amounting to &c., in consideration thereof promised the plaintiff to pay him therefor in merchantable boards, at the market price, (being at the rate of \$— a thousand) to be delivered to him at a convenient wharf in S, seasonably, and ready to be shipped in the plaintiff's ship C, then bound on a voyage thence to I, and ready to sail on receiving said boards, to be delivered on said wharf seasonably for said voyage accordingly ; yet the said E, not minding his promises and agreements aforesaid, did not seasonably pay said sum in said

boards, and deliver them to be shipped for said voyage, in said ship, though thereto requested, on &c., at &c.; by means whereof said ship was detained, and said voyage was delayed for &c. months, between that day and the &c. day of &c. and he still refuses to pay said sum in boards aforesaid, to the damage &c.

Another. For not delivering boards. Recital of special agreement.

FIRST COUNT. For that whereas, at &c. on &c., one C had given a note for the payment of &c., with interest, to the plaintiff, as security to the plaintiff for a like sum advanced to the said D, and the said D had given his note of hand for a like sum, with interest, to the said C to indemnify him, the said C, against his note given to the plaintiff, as aforesaid; and also whereas it had been further agreed between the said D and the plaintiff, that the said D should deliver to the plaintiff, at &c., on &c., — feet of merchantable seasoned boards, at \$— for a thousand feet, and five thousand feet of clear seasoned boards, at \$— for a thousand feet, and in that proportion to amount to &c., and that the plaintiff should deliver up his, the said C's note, on the delivery of the boards aforesaid, in consideration thereof, and that the plaintiff then and there promised the said D faithfully to perform his part of the agreement aforesaid, the said D then and there promised the plaintiff, that he, the said D, would faithfully perform his part of the agreement aforesaid; nevertheless, the said D, not minding his promise aforesaid, but fraudulently contriving to injure the plaintiff, though the said time of the delivery of the said boards, as agreed on, has long since elapsed, and though often requested, and though the plaintiff has been always ready to receive the said boards, to wit, at &c., and to deliver up the said C's note, according to the agreement aforesaid, hath not delivered the said boards, or any part thereof to the plaintiff, but wholly refuses and neglects so to do.

For not delivering boards according to contract.

SECOND COUNT. And for that the said E, at &c., on &c., for value received, promised the plaintiff to deliver him, at &c., aforesaid, in the month of &c., then next following, other merchantable seasoned boards, at the price of \$— for every thousand feet, and clear seasoned boards, at the price of \$— for every thousand feet, to the full amount of \$—, in the proportion of five thousand feet of clear seasoned boards,

for every twenty thousand feet of merchantable seasoned boards ; yet the said E, not minding his said promise, but fraudulently contriving to injure the plaintiff, though often requested, and though the plaintiff, has been always ready to receive the said boards, to wit, at &c. aforesaid, hath not delivered the said boards or any part thereof, but wholly neglects and refuses so to do.

S. PUTNAM.

On note payable partly in money and partly in work, at an agreed price.

For that the said E, at &c., on &c., by his note in writing under his hand, of that date, for value received, promised the plaintiff to pay him, or his order, the sum of £90 lawful money, of the value of \$300, as the plaintiff avers, in six months from the date of the said note, and that he would pay him, £60, part thereof, of the value of \$200, as the plaintiff avers, in printing, at the Boston customary price per sheet, and the remaining £30, of the value of \$100 in cash, and the said E, in and by his note, further promised the said plaintiff, that if he could be prevented by any accident from paying the said £60 in work, as above mentioned, he would then pay him the same sum in cash, with lawful interest on the said £90 first mentioned, until paid. Now the plaintiff, in fact says, that the said E, though often requested, has never paid the said sum of £60, in work, as above mentioned ; nor has he, though alike requested, paid the said sum of £90, in cash, according to his promise, but unjustly neglects and refuses so to do. C. C. P. Essex, 1794, *Osborne v. Robinson*.

T. PARSONS.

Consignee v. Master ; for not delivering goods consigned to plaintiff.

For that whereas the said E, on &c., at C, in parts beyond seas, to wit, at B aforesaid, received of E. W. on board the ship, called &c., whereof the said D then was master, (goods) all of the value of &c. dollars, in good order and well conditioned, to be transported by him from C to M aforesaid, the dangers of the sea only excepted, and there to be delivered in like good order and well conditioned, to the plaintiffs or their assigns, they paying freight therefor &c. dollars, with primage and average accustomed ; in consideration of the premises, the said D then and there promised to transport and deliver the said goods accordingly : now the plaintiffs say, that the said ship afterwards, on &c., did arrive at said M, and that they did then and there pay said freight to one A. O. Esq., owner of said ship, of which

the said D had notice, and that no primage or average is, in such case, accustomed to be paid; yet the said D, though he was then and there requested to deliver said goods, refused and still refuses so to do, &c.

Consignee v. Master; on a bill of lading.

For that the said D, at &c., on &c., received on board the ship, called the M, whereof the said D was master, five hogsheads &c. [containing the goods in the annexed schedule enumerated,] and on &c., at &c., signed a certain note in writing, called a bill of lading, and then and there undertook, the dangers of the sea only excepted, to deliver the said goods at &c. to the plaintiff, he paying customary freight; and afterwards, to wit, on &c., the said D arrived in said ship, at said &c.; yet he hath not delivered said &c. [goods] though often requested by the plaintiff, who has always been ready to pay the freight aforesaid, but neglects so to deliver the same, &c.

J. ADAMS.

Consignor v. Master, for not transporting or delivering goods.

For that whereas the said plaintiff, on &c., at &c., loaded in and upon the good ship, called &c. whereof the said D was master, riding at anchor in the port of &c., the goods and merchandises following, to wit, &c., to the value of &c. dollars, in good order and well conditioned, and from thence to be transported by the said D, to be delivered in like good order and well conditioned (the dangers of the sea only excepted,) at &c., unto C, or his assigns, freight for said goods being paid by said plaintiff to the said D, at &c. on &c., with primage and average accustomed; the said D, in consideration of the premises, afterwards, on the same day, at &c., promised the said plaintiff that the goods and merchandises aforesaid, he, the said D, would transport in said vessel, from &c., to &c., and to the said C or his assigns, well and faithfully would deliver the same in like good order, and well conditioned (the dangers of the sea only excepted); and although the said ship, with the goods and merchandises therein loaded, afterwards, on the same day, sailed from &c., and although the dangers of the sea did not hinder the said D from proceeding in said vessel to &c. aforesaid, yet the said D, contriving to injure and defraud said plaintiff of the goods and merchandises aforesaid, did not transport the same to &c. aforesaid, nor there deliver

said goods and merchandises to the said C, or his assigns but hath hitherto neglected and utterly refused so to do.

Shipper v. Owner of ship, for not taking aboard, transporting, nor delivering goods.

For that whereas the said C, E, and T were, on &c., at said B, owners of the ship called the T, (of which H. B. was then the master, by the said owners appointed,) then riding at anchor before the city of A, and employed by the said owners to take on board goods, wares, and merchandise from thence, for such persons as should apply therefor, and to transport the same to the said B, for hire, to be paid them therefor. And the plaintiffs then having, in good order and well conditioned, at said A, one case marked S, P. O., containing three hundred and four pounds of Bohea tea, net weight, of the value of \$500, to be transported from thence to the said B, the said C, E, and T, then and there, viz. at the said B, in consideration that the plaintiffs had then and there paid them a certain sum of money, viz. 63 guilders of current money of the said city of A, of the value &c. of our lawful money, for the taking on board, and transporting in said ship, said case, with the said contents, from the said city of A to said B, there to be delivered to the said plaintiffs, or their assigns, in like good order and well conditioned, the dangers of the sea only excepted, and had then and there delivered them the said case, with the said contents, to be taken on board, transported and delivered as aforesaid, promised the plaintiffs, that they would take the said case on board the said ship, and transport the same in her from said city of A to B aforesaid, and there deliver the same, in like good order and well conditioned, to the plaintiffs or their assigns, the dangers of the seas only excepted, upon the arrival of the said ship at said B. And the plaintiffs further say, that the said ship, afterwards on &c. arrived at the said B, safe with her lading, without having received any injury from the seas; yet the said C, E, and T, not regarding their promise aforesaid, but intending to injure and defraud the plaintiffs, never took the said case on board said ship, nor transported the same to said B; nor have they ever delivered the same to the plaintiffs, or to their assigns, though thereto requested, viz. on &c., at said B, but unjustly neglect and refuse so to do.

T. PARSONS.

Indorsee of bill of lading v. Master, for not delivering goods.

For that whereas the said C, on &c., in parts beyond seas, viz. at T, in the W. I., was commander of a certain ship, called the A, which ship was then bound from thence on a voyage to the port of B, in this Commonwealth; and the said ship, being so bound, and the said C, being so commander, as aforesaid, one R F then and there caused to be shipped in said ship, divers goods and merchandises, viz. ten hogsheads of sugar, in good order and well conditioned, to be carried in said ship from the said port of T to the said port of B, and there to be delivered in like good order and well conditioned, the dangers of the seas only excepted, to the plaintiff or his assigns for a certain reasonable freight viz. &c. to be paid to the said C, with primage and average accustomed, whereof the said C then and there had notice. And the said C then and there, viz. at said T, made and subscribed under his hand, a certain bill of lading, and thereby acknowledged the shipping of the said sugar in the said ship, and undertook, on her arrival at the said port of B, to deliver the said hogsheads of sugar in good order and well conditioned, the dangers of the seas only excepted, to the plaintiff or his assigns, he or they paying primage and average &c., as aforesaid; and by a certain written indorsement, with the handwriting of the said C subscribed, then and there made on said bill of lading, it was declared, that the said hogsheads of sugar, in the said bill mentioned, were consigned to the plaintiff upon the express condition, that the plaintiff would accept and pay certain bills of exchange, drawn upon the plaintiff by the said R F, bearing date the 2d of July, 1788, in favor of certain persons carrying on trade and commerce under the style of Z and Co., at ninety days' sight, for \$1000; but if the plaintiff would not accept or pay the said bills, or to the amount of said sugar, the said C, by the said indorsement, engaged to deliver the said sugar to the holder of the said bills. And the said C then and there delivered the said bill of lading, with the said indorsements thereon, to the plaintiff; whereby the said C became liable, and then and there promised the plaintiff faithfully to deliver to him the said hogsheads of sugar, according to the tenor of said bill of lading, and the indorsement thereon made as aforesaid. And the plaintiff in fact says, that the said ship, with the said hogsheads of sugar on board thereof, afterwards, on &c., arrived safe at said B from that voyage. And the plaintiff further says, that he,

the plaintiff, hath always, since the said arrival of said ship, been ready and willing to receive the said hogsheads of sugar, and to pay the freight for the same at the rate aforesaid, with primage and average accustomed, as in the said bill of lading specified, and to pay the said bills of exchange, in the said indorsement mentioned, to the amount of said sugar at B aforesaid; of which the said C there, on &c., had notice and was then and there requested to deliver the said hogsheads of sugar to the plaintiff, according to his promise aforesaid; yet the said C, notwithstanding his said promise, hath never hitherto delivered the said hogsheads of sugar, or any or either of them, but wholly neglects and refuses so to do.

3. *For Legacies.*

Administrator of legatee v. Devisee, for a legacy.

For that A, late of said A, gentleman, deceased, in his lifetime, *viz.* on &c. was seized of a parcel of land in Jones' lot (so called) adjoining to said C's house-lot in said A, and other real estate, consisting of upland, meadows, and mills, in said A, and elsewhere, of great value, and being so seized, on the same day, at A aforesaid, made his last will and testament, in writing duly executed, and therein and thereby, after having devised part of said real estate to other persons, devised his said land in said Jones' lot, and one undivided third part of the remainder of his said real estate, to said C, his heirs and assigns forever, and in and by said will, ordered the said C (among other things) to pay to the said B, who was the testator's grandson, and then living, the sum of &c. (which sum the said testator gave said B, in and by his will), in one year after the decease of said A, and afterwards, *viz.* on &c., the said A died at A aforesaid, so seized of the premises, and his said last will and testament hath been since duly proved, approved, and allowed, as the law directs, and the said C, on the death of said testator, at A aforesaid, assented to said devise, and entered into the premises devised to him as aforesaid, and thereby became liable and chargeable by law, to the said B, then living, to pay him said sum of &c., in one year from that time, and in consideration thereof, then and there promised him to pay him the same accordingly; yet the said C, though that time is past, and though requested by said B, at the end of said year, *viz.* on &c., at &c., (the said B being then also in full life)

never paid the same to him while living, nor to the said plaintiff, administrator as aforesaid, since, though alike requested, but neglects it, to the damage &c. *Essex*, 1790, *Tilcomb v. Barnard*.
T. PARSONS.

NOTE. By the Rev. Stat. of Mass. every legatee may recover his legacy in an action at common law, &c. ch. 66, § 16.

Actions by legatees against an executor or administrator with the will annexed, may be brought in Debt or in Assumpsit. It seems in Massachusetts, if there are sufficient assets, a promise may be implied.

A legatee may also have a remedy against the executor or administrator, for not paying the legacy, by suit on the probate bond.

Such action may be brought after the expiration of one year from the time of the executor's giving his probate bond, if the estate is solvent.

But under section 15, of the same chapter of the Revised Statutes, if the executor is required to pay a legacy or distributive share within four years after giving bond, the Judge of Probate, if he sees fit, may require the legatee, &c. to give bond to refund, &c.

Baron and feme for a legacy bequeathed the wife before marriage, and charged on real estate v. Surviving devisees.

For that one A, father of the said M, at &c., on &c., being seized and possessed of large real and personal estate, made his last will and testament in due form of law, and therein bequeathed to the said M, then single and unmarried, the sum of &c., to be paid her on demand, after his decease, and after bequeathing some other legacies in his said will, the said A, the testator, devised all the rest and residue of his estate, real and personal, to his three sons, to wit, C, then living, but now deceased, and to the said D and E, and to their heirs, as tenants in common, they to pay all the debts, the said testator should owe at his decease, his funeral charges, and all the legacies bequeathed by him in his last will, the charges of all which should be borne equally between them. And the testator, afterwards, to wit, at &c., on &c., died seized and possessed of a large estate, real and personal, more than sufficient to pay all his debts, funeral charges, and legacies aforesaid, and, afterwards, to wit, at &c., on &c., the said will was duly proved, approved, and allowed, an attested copy whereof is in court to be produced, and the said C, D, and E, then and there entered into and became seized and possessed of the estate so devised to them as aforesaid, upon the conditions and limitations aforesaid, which was more than sufficient to pay all the testator's debts, funeral charges, and legacies aforesaid, and thereby became liable in law to pay to the said M her legacy aforesaid, on demand; and in consideration thereof,

then and there promised the said M, to pay her the same on demand; yet though requested by the said M, to wit, at &c., on &c., the said C, D, and E, nor either of them, either in the lifetime of the said E, nor since his death, never paid the same to the said M while single, or to the plaintiffs since their intermarriage, and the said D and E still unjustly refuse so to do; to the damage &c. *Essex, 1790, Montgomery v. Peabody,*

T. PARSONS.

Administrator of Legatee v. Devisee for a legacy charged on real and personal estate.

For that one A, at &c., on &c., was, among other estate, seized and possessed in fee simple, of &c. acres of land in &c., of about &c. acres of land in &c., and of certain other lands in W, N, and B, and being so seized and possessed, then and there made his last will and testament in writing duly executed, and therein and thereby devised all the lands aforesaid, excepting seven undivided eighth parts of said outlands, in W, N, and B, to the said D and his heirs, and all his, the said A's, physical books and medicines, he paying out, among other legacies, the sum of &c., to said M, then living, to be paid in one year after his, the said A's, decease, which is now past, and afterwards, to wit, at &c. on the same day the said A died, seized and possessed as aforesaid, and afterwards, to wit, on &c. said last will and testament was duly proved, approved, and allowed, and said D afterwards, to wit, at &c., on &c., accepted of said devise, and then and there entered into possession of the same, subject to the payment of said legacy, of &c. to said M, as aforesaid, and thereby became liable, and in consideration thereof then and there promised the said M, to pay her that sum in one week after the decease of the said A, which is now past, yet the said D, though often requested, has never paid the said sum to said M in her lifetime, nor to the said plaintiff since her decease, which is to the damage of the said plaintiff, in his said capacity, &c. *Sawyer v. Ordway.*

T. PARSONS.

Legatee v. Devisee, who were also executors, for a legacy charged on real and personal estate.

For that whereas the said A [testator] on &c., at &c., being then seized and possessed of a large real and personal estate, made his last will and testament, in writing, under his hand and seal, and thereby devised to his two sons, the said D and E, and their heirs, all his estate, both real and

personal, in certain proportions, between them to be divided; they, among other things, paying to the said C &c. dollars, within four years after his death. And the said A therein appointed the said D and E executors of his last will and testament; and afterwards, viz. on &c. at &c. died so seized and possessed thereof; and the said D and E afterwards, viz. on &c., accepted of the said trust of executors, and caused the said last will and testament to be duly proved and approved, and allowed, and agreed to the devise aforesaid, and entered into and possessed themselves of all and singular the said A's estate, both real and personal, being of a greater value than his debts and the legacies bequeathed by him in his said last will and testament; and thereby they became liable, and then and there promised to pay the said C the said &c. dollars, within four years after the said testator's death; yet though that time is elapsed, the said D and E, or either of them, hath not, nor have ever paid said sum, or any part thereof, though requested, but unjustly neglects so to do. F. DANA.

4. On Awards.

For not paying money on an award.

For that on &c. there were divers controversies between the said D and B, concerning their mutual accounts and debts, and then at &c., they appointed one A to hear and determine for them all said controversies, and mutually promised each other, to stand to and abide by the award of the said A thereupon; and the said A afterwards, on &c., at &c., there heard the said D and B, and adjudged upon the premises, and awarded that the said D should pay to the said B a balance of &c. dollars, on demand, and notified the said D and B thereof; yet the said D, though requested, hath not paid the said sum, but unjustly neglects so to do.

NOTE. If a matter in dispute is submitted *by parol* to arbitration, and the arbitrators award merely that a sum of money is due from one party to the other, it is not necessary to declare specially on the award; the sum awarded may be recovered under a count in *Indebitatus Assumpsit*, or a count on an *instimul computassent*. *Bates v. Curtis*, 21 Pick. 247.

But where the award is for the performance of some collateral act, it must be declared on specially. *Ibid.*

For not paying money, according to an award by parol submission.

For that whereas sundry disputes, discords, quarrels, and accounts, had arisen and were depending between the said

D and the plaintiff, concerning work done and materials found by the plaintiff for the said D, and other work, procured to be done for the said D by the plaintiff, and also &c. [stating the demands]; and, in order to make an end and final determination thereof, as well the said D as the plaintiff, on &c., at &c., submitted to stand to the arbitration and award of A, of &c., and B of &c., arbitrators indifferently chosen between the said D and the plaintiff to arbitrate, order, and finally award of, upon, and concerning the premises. And the said D afterwards, viz. on &c., at &c., in consideration of the said submission, and in consideration that the plaintiff did then and there promise the said D, that he, the plaintiff, would faithfully abide by and fulfil, whatever the said arbitrators should award and finally determine concerning the premises, on his part to be fulfilled, then and there promised the plaintiff that he, the said D, would well and truly perform and fulfil, all and singular those things, which the said arbitrators should finally arbitrate, award, and determine on his part to be performed and fulfilled concerning the premises. And the plaintiff, in fact saith, that the said arbitrators did undertake the business of arbitrating, ordering, and awarding between the said D and the plaintiff, of and concerning the premises, and did, by their award made afterwards thereon, viz. on &c., at &c., arbitrate, order, and award, between the said D and the plaintiff, in manner following, viz. that he, the said D, should pay to the plaintiff the sum of &c. dollars, in full of all demands that the plaintiff had on the said D for the work done, or procured to be done, &c. by the plaintiff as aforesaid. And the plaintiff further saith, that the said D hath not paid the said sum of &c. dollars to the plaintiff, according to the form and effect of said award, although the said D, on &c., at &c., had notice of such award, and was then and there requested by the plaintiff thereto; but the said D, not regarding his promise made as aforesaid, but contriving to defraud the plaintiff, still wholly neglects and unjustly refuses so to do.

J. QUINCY, Jr.

For not performing an award in writing.

For that on &c., at &c., there had been sundry accounts, trade and dealings between the said D and the plaintiff, that then remained unsettled; and sundry mutual demands were subsisting between the said D and the plaintiff; and, for an amicable settlement and final determination of the

matters aforesaid, and of the mutual demands aforesaid, the said D and the plaintiff, on &c., at &c., aforesaid, submitted all the demands and matters aforesaid, to the arbitrament and final determination of A and B, and chose them arbitrators to make their final award upon the premises, and mutually promised each other to abide by and perform such award, or else to pay the sum of \$20 to the other. And, at the request of the said D and the plaintiff, the said arbitrators undertook the trust aforesaid and heard the parties aforesaid upon all the matters aforesaid; and thereupon, afterwards, viz. on &c. at &c., aforesaid, made and delivered to the said parties, in writing, their final award upon the premises, submitted pursuant to said submission and agreement, wherein and whereby the said arbitrators ordered and awarded the said D, to pay the plaintiff or his order, the sum of &c. dollars, and ordered and awarded that the said D and the plaintiff should execute to each other a full discharge of all the demands aforesaid; and thereupon, and by means thereof, the said D became obliged either to pay to the plaintiff the same sum on demand, and to execute the discharge on his part, or else, on demand, to pay the plaintiff the said sum of &c. dollars. And the plaintiff avers that he was then and there ready to execute the discharge, by him to be executed as aforesaid, and on his part to perform the award aforesaid, and ever since has been ready so to do; yet the said D, though then and there, and at sundry times since, thereto requested, hath refused and still doth refuse to abide by and perform on his part the award aforesaid, and also to pay said sum of &c. dollars, and still doth neglect to pay either of said sums; whereby an action hath accrued to the plaintiff to sue for the same; all which is to the damage, &c. *Butler v. Noyes.*

For not performing an award in writing.

And for that whereas, before the &c. day of &c., some disputes had arisen and were depending between the said plaintiff and the said E, respecting some flour (being other but similar to that described in the account annexed) which the plaintiff agreed to sell said E, at thirty cents per barrel, advance, and in addition to the costs and charges thereof, and the plaintiff had charged the same at the price mentioned in the said account annexed, and disputes had arisen between the plaintiff and the said E, respecting the costs and charges of said flour, and whether the said E should be

obliged to receive the same, and concerning the price he ought to pay the plaintiff therefor; and the plaintiff and the said E, at &c., on the said &c. day of &c. last past, in order to make an end and final determination of the said disputes, submitted themselves to the arbitrament and award of A and B, both of said &c., merchants, mutually chosen by the plaintiff and the said E, to arbitrate, order and award concerning the premises, and the said E thereafterwards, on the same day, in consideration of the premises, and in consideration that the plaintiff did then and there promise the said E, that he, the plaintiff, would faithfully abide by and perform, whatever the said arbitrators should finally order and award in the premises, on the plaintiff's part to be performed and abided by, undertook and promised the plaintiff, that he, the said E, would well and faithfully abide by and perform, all and singular those things which the said arbitrators should order and award, on his, the said E's, part to be abided by and performed concerning the premises. And the plaintiff, in fact saith, that the said arbitrators did undertake the trouble of arbitrating and awarding, between him and the said E concerning the premises, and having fully heard the plaintiff and the said E respecting the premises, thereafterwards on the said &c. day of &c., did, by their arbitration under their hands arbitrate, order and award, that the said E ought to receive the plaintiff's flour as charged in said account, with the addition, as agreed on between themselves, which the plaintiff avers to have been the addition of thirty cents upon each barrel, advance upon the costs and charges thereof, as mentioned in said account, amounting in the whole, to wit, for the costs and charges and addition in advance, as the plaintiff avers, to the sum of \$1588,19; of all which the said E thereafterwards, on the same day had notice. And the plaintiff avers that he thereafterwards on the same day, delivered, and the said E did accordingly receive the said flour last mentioned; yet the said E hath not paid the plaintiff the said sum of \$1588,19, according to the same intent and effect of said award, but only part thereof, viz. \$1000, although he was thereafterwards, at &c., on &c., thereto requested; the residue whereof, viz. &c. the said E, though then and there, and although often afterwards requested, hath not paid, and he still neglects to pay the same according to the form, intent, and effect of said award. *Pierce v. Treadwell, Essex S. J. C. Nov. Term, 1802.*

S. PUTNAM.

NOTE. The declaration should set forth an award, good in all respects; if it appears to be on one part only, it will be bad; and it seems that if it awards any collateral thing, as a release, it will not be good without writing. See 1 Lev. 113; 1 Sid. 160.

5. *Promissory Notes.*

On note payable on demand.

For that the said D, at &c., on &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him, *or his order on demand*, the sum of &c. dollars, *with lawful interest therefor until paid*; yet, though requested, the said D hath never paid the said sum, but refuses so to do.

NOTE. The words in italics will be inserted or omitted, according to circumstances. Any mistake or misdescription here, will be a fatal variance.

Where the note is given by a firm, say, "for that the said D and E, on &c., at &c., by their promissory note of that date subscribed by the name and style of — &c."

Under Mass. Stat. 1839, Sect. 1, the maker of a note, payable *on demand*, in an action against him by an indorsee, may avail himself of any legal defence, that would be sufficient in an action on the same note by the payee.

On a note payable after date.

For that the said D, at &c., on &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him or his order, the sum of &c. dollars, in six months after date, *with lawful interest therefor after said six months, until paid*; and the plaintiff avers that the said six months have elapsed; yet though requested, &c.

NOTE. The words in italics must correspond with the note.

In declaring on a note, it should be set out as it really is; an omission of any of the conditions or contingencies, upon which a note is payable, will be a variance. See Imp. Plead. 429.

On a note payable to bearer; by the holder.

For that the said D, at &c., on &c., by his promissory note of that date, by him subscribed, for value received, promised one E. F. to pay him, or bearer, the sum of &c. dollars on demand; and the said E. F. thereafterwards on the same day, transferred and delivered the said note, then and still unpaid, to the plaintiff who thereby became the lawful bearer thereof; by reason whereof the said D became liable, and in consideration thereof, then and there

promised the plaintiff, to pay him the contents of the said note according to the tenor thereof; yet, &c.

NOTE. In a similar case it was decided, that it was sufficient to aver, that the plaintiff was the holder of the bill *for a valuable consideration*. 5 Mass. R. 97. But it seems the value of the consideration could never be inquired into, if the original promisee gave a valuable consideration for it; for such promisee might make a present of it to the holder.

On an indorsed note, by indorsee against maker.

For that the said E, at &c., on &c., by his promissory note of that date, by him subscribed, for value received, promised one E. F. to pay him or his order the sum of &c. dollars, six months after date, with lawful interest therefor, until paid; and the said E. F. thereafterwards on the same day, indorsed and delivered the said note to the plaintiff, by reason and in consideration whereof the said E became liable, and promised the plaintiff to pay him the contents of the said note according to the tenor thereof. And the plaintiff avers, that the said six months have long since elapsed; yet, &c.

NOTE. If there are several indorsements, say, *and the said E. F. thereafterwards, on the same day, indorsed and delivered the said note to one G. H. who thereafterwards, on the same day, indorsed and delivered the same to the plaintiff, &c.*

If the first indorsement be special to any one by name, in an action by an indorsee after him, his indorsement must be stated.

An indorsement on a blank note or check, in the form of a bill of exchange or promissory note, will bind the indorser, for any sum, which the person to whom he entrusts it so indorsed, shall insert in it. Doug. 514. The holder may declare as indorsee. See 3 Mass. R. 275; 12 Johns. R. 159; 4 Mass. R. 45; 5 Cranch, 142; 16 East, 21.

On an indorsed note; Indorsee v. Indorser.

For that one G, on &c., at &c., by his promissory note of that date by him subscribed, for value received, promised the said E to pay him or his order, the sum of \$—, one year after date, and the said E thereafterwards, on the same day, indorsed and delivered the said note to the plaintiff; and the plaintiff avers, that afterwards, when the said note became payable, viz. on &c., at &c., the said note was duly presented to the said G, and payment of the said sum according to the tenor of the said note, was then and there duly required of the said G, who then and there refused to pay the same, of all which the said E thereafterwards, viz. on the same day, had notice, by reason whereof the said E became liable, and in consideration thereof, then and there promised the plaintiff to pay him the contents of the said

note, when thereunto requested ; yet, though often requested, &c.

NOTE. If the note &c. is payable in foreign currency, the value of it should be averred in the declaration.

If it is made payable at a particular place, it must be so stated in the declaration. The omission will be a fatal variance. 3 Camp. 247. So of a bill of exchange. 3 Camp. 463.

If a note be payable May 1, and the indorsement appoints it to be April 1, as to the indorser this is a promissory note, payable April 1, but not as against the drawer. See 1 Str. 479.

A count for money had and received, may be maintained by the indorsee against the indorser of a promissory note, even in the cases where no money has been actually received for indorsing the note, and against the maker by the indorsee for the same reasons.

See *Cole v. Cushing*, 8 Pick. 48; *Ellsworth v. Brewer*, 11 Pick. 320; *Payson v. Whitcomb*, 15 Pick. 216.

The following averments may be used according to circumstances.

Averment of want of effects, to excuse notice of non-payment in an action against an indorser.

— And the plaintiff avers, that, at the time of making the said promissory note as aforesaid, and from thence until and at the time, when the said note was so presented for payment as aforesaid, the said F (*the maker*) had not in his hands any effects of the said E, nor had the said F received any consideration from the said E, for the making or paying the said note: but the said F made the said note for the accommodation, and at the request of the said E, and the said E hath not sustained any damage by reason of his not having had any notice of the non-payment by the said F, of the sum of money specified in the said note ; &c.

Averment that maker could not be found when the note became due ; in an action against an indorser.

— And the plaintiff avers, that when the said note became due, *viz.* on &c., diligent search and inquiry was made after the said F, at &c. *where the note was payable*, in order that the said note might be presented to the said F for payment, but that the said F on strict search and inquiry, could not be found, nor did the said F then, or at any time before or since, pay the said note, but hath wholly neglected so to do ; of all which premises the said D thereafterwards, *viz.* on &c. had notice, and thereby became liable, &c.

Second Indorsee v. Maker.

For that the said E, on &c., at &c., by his promissory

note of that date, by him subscribed, for value received, promised one F, to pay him or his order, the sum of &c. within three months after the date of said note, with lawful interest therefor until paid ; and the said F thereafterwards, on the same day, by his indorsement of the said note, in writing under his hand, appointed the contents of the said note, then unpaid, to be paid to one G, or to his order, according to the tenor of said note ; and the said G, thereafterwards on the same day, by his indorsement of the said note in writing under his hand, appointed the contents of the said note, then unpaid, to be paid to the plaintiff ; of all which the said E, then and there had notice, and thereby became liable, and, in consideration thereof, then and there promised the plaintiff to pay him the contents of the said note, according to the tenor thereof ; and the plaintiff avers that the said three months have long since elapsed ; yet &c.

Indorsee against indorser ; on note drawn by two persons whose christian names are not known.

For that certain persons, using the name and firm of A and B, on &c., at &c., by their promissory note, in writing under their hands, of that date, for value received, promised the said D to pay him or his order, the sum of &c., two months after the date thereof ; and the said D thereafterwards, on the same day, by his indorsement on the said note, in writing under his hand, appointed the contents of the said note, then unpaid, to be paid to the plaintiff, according to the tenor thereof ; and the plaintiff thereafterwards, at the expiration of the said two months, viz., on &c., at &c., presented the said note, with the indorsement thereon, to the said persons, so using the name and firm of A and B, and then and there requested them to pay the said sum of money, therein specified, to the plaintiff, according to the tenor and effect of the said note and of the said indorsement, who then and there refused so to do ; of all which the said D, then and there had notice, and thereby became liable, and in consideration thereof, then and there promised the plaintiff to pay him the said note, according to the tenor and effect thereof, and of the said indorsement so made thereon as aforesaid ; yet, though the said two months have long since elapsed, and though often requested, &c.

NOTE. Under Mass. Stat. of 1839, § 2, where a note is payable on demand, a demand within or at the expiration of sixty days from date (excluding grace,) if the indorser has due notice, will be made within a reasonable time to charge him.

Payee v. Maker. On a note payable by instalments; for the first instalment.

For that the said E, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him or his order, \$50 in manner following, *viz.* \$10 on the 19th of March; \$10 on the 19th of April; \$10 on the 19th of May; \$10 on the 19th of June; and the other \$10 on the 19th of July then next; yet, though the said 19th day of March has long since elapsed, and though \$10, part of the said sum of \$50 has become due, and though often requested, the said E has never paid the same &c.

NOTE. Where a note is payable by instalments, and there is a default in the payment of the first instalment, it has been recommended to bring the action for the entire debt, because the plaintiff cannot have a new action. See *Beckwith v. Nott*, Cro. Jac. 304.

On a note payable by instalments, and if one of those be not paid, the note to be in force for the whole sum. Action is brought for the whole sum, the first instalment not being paid.

For that the said E, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him or order, \$90 in manner following, *viz.* the sum of \$9 every quarter day, until the said sum of \$90 should be fully discharged; the first payment to be made on &c., or within nine days then next, and so continue quarterly until fully completed; and in default of payment of any or either of the said quarterly payments, or any part thereof, the said whole note to be in full force for the whole of the said \$90; and the plaintiff avers, that the said E did not pay to him, the said plaintiff, the first payment of \$9, which by the said note was to be paid to him, at or within nine days next after the &c. day of &c. now last past, whereby the said note became, and is in full force for the whole of the said sum of \$90, whereof the said E afterwards, *viz.*, on &c., at &c., had notice, &c.

In a note like the above, interest should be calculated on the whole sum remaining due when the action is brought, and not merely on the instalment. 4 Esp. N. P. C. 147.

On a joint and several note, against one.

For that the said D and one E, on &c., at &c., by their promissory note in writing, under their hands, of that date, for value received, jointly and severally, promised the plaintiff to pay him or his order, \$100, one month after date,

which said month has long since elapsed ; yet, though often requested, the said D and E, or either of them, have not paid the said sum, but they and either of them have wholly refused so to do.

NOTE. *Quere* of this precedent. On a joint and several note, either promisor may be sued, as if he alone had given the note in his own name. The above form states the note as it really is, and there seems to be no impropriety in it, because it gives an opportunity of introducing in the conclusion, *that neither of the promisors had paid the note*, which in cases where a payment by either would be sufficient, one would think almost indispensable. See the precedent in Imp. Pl. 429. See Cowp. 432.

If there be several drawers of a joint and several note, the acknowledgment of one of them takes it out of the statute of limitations, and it may be given in evidence, even in a separate action against any of the others. Doug. 652.

If a note of hand be, "we promise to pay," and signed by one only, that person may be sued alone, as on a note in the singular number. 1 Bur. 323.

A note of hand beginning, "I promise to pay," signed by several, is a joint and several note. Bayley on Bills, 29.

On a note payable on the contingency of a ship's arrival.

For that the said S, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him the sum of \$—, three days after the arrival of the ship Ann at said &c. ; and the plaintiff avers that the said ship Ann afterwards, viz. on &c., arrived at said &c., viz. at said &c. ; of all which said several premises, the said S thereafterwards, viz. on &c., at &c., had notice ; yet though said three days have long since elapsed, and though requested, &c.

On a note indorsed for residue, after a payment of part.

For that the said E, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised one A. B. to pay him or his order, the sum of \$— in three months from the date of said note, which said three months have long since elapsed ; and the said A. B., thereafterwards on the same day, indorsed and delivered the said note to one S. T., and the said E, after the said indorsement so made to the said S. T. as aforesaid, viz. on &c., at &c., paid to the said S. T. the sum of \$— in part payment of the said note, and the said S. T., thereafterwards on the same day, indorsed the said note, and thereby appointed the residue of the sum of money specified in the said note, then and still unpaid, to be paid to the plaintiff, whereof the said E thereafterwards on the same day had notice, and

thereby became liable, and in consideration thereof, then and there promised the plaintiff to pay him the residue of the said sum, according to the tenor of the said note, and the effect of the said indorsements, so made thereon as aforesaid; yet &c.

On a note payable after the death of a third person.

For that the said D, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him the sum of \$—, three months after the decease of A B, of &c. Esq., and the plaintiff avers that the said A B, afterwards, viz., on &c., at &c., died, of which the said D thereafterwards, viz., on the same day had notice. Yet, though said three months after the decease of the said A B, have long since elapsed, and though often requested &c.

Payee v. Maker, on a note payable in eight years, interest annually; for three years interest, principal not due.

For that the said E, at a place called P, to wit, at &c. aforesaid, on &c., by his note under his hand of that date, for value received, promised the said plaintiff, to pay to her or her order, the sum of \$10,000, lawful money, in eight years from the said date, with lawful interest for the same until paid, the said interest to be paid yearly, and at the end of each and every year, during said term. Now the said plaintiff saith, that three years of the said term have long since expired, yet the said E, though requested, has never paid the interest of the said sum, nor of any part thereof, for the said three years, nor for any part thereof, but unjustly neglects and refuses so to do. *Greenleaf v. Kellogg, 1800.*

T. PARSONS.

Against inhabitants of a town; on a note signed by their treasurer.

Summons the inhabitants of Haverhill, to answer to A A, in a plea of the case, for that, at said H, on &c., one B B, by a certain promissory note of hand of that date, by him made and signed, for value received of the said A A in £90 lawful money, in continental currency, of the value of &c., of our now lawful money, for the use and service of said inhabitants, the said B B, being then and there treasurer of said town of H, promised and obliged himself and his successors in the office of treasurer as aforesaid, in behalf of said inhabitants, to repay to said A A the said sum

of £90, of the value of &c., of our now lawful money, on demand, with lawful interest for the same until paid: the said B B, being then and there agent and treasurer for said inhabitants, and by them duly authorized to make and sign that note on their behalf; of all which the said inhabitants had notice, and thereby became liable to, and in consideration thereof, then and there promised the said A A to pay him the same sum on demand, with lawful interest as aforesaid until paid; yet, though requested, the said inhabitants have never paid the same, but unjustly neglect and refuse so to do.

Same, as though made by inhabitants themselves.

For that the said inhabitants, on &c., at &c., by their note signed by B, their treasurer, by their order and in their behalf, for value received, promised, &c. [*As before.*]

BRADBURY.

Husband and Wife v. Surviving Promisor, on a note given to wife while single.

For that the said D and one B, then living, but since deceased, at &c., on &c., by their note under their hands of that date, for value received of the said C, then sole, promised the said C, by the name of &c., to pay her, or order, the sum of &c., on demand; yet, though often requested, the said D and B, or either of them, in the lifetime of said B, or since his death, the said D never paid the same to the said C, when sole, nor to the plaintiff, since the intermarriage of the plaintiff and said C, though alike requested, but wholly neglected and refused, and the said D still refuses so to do.

On note given to plaintiff's wife since marriage.

For that the said D, at &c., on &c., by his note under his hand of that date, for value received, promised C, then, and as yet, the wife of the plaintiff, by the name of &c. to pay her the sum of &c. in four months from the date of said note, which are long since past, with lawful interest therefor until paid, which said note the plaintiff afterwards, on the same day, accepted and agreed to, by reason whereof the said D became liable, and in consideration, &c. PARSONS.

Indorsee v. Husband and Wife, on note of wife while sole.

For that the said A, while sole, on &c., at &c., by her note under her hand of that date, for value received, pro-

promised one C to pay him, or order, the sum of &c. on demand with interest therefor; and, afterwards, there on the same day, the said C, by his indorsement in writing of the same note under his hand, ordered the contents thereof, then unpaid, to be paid to the plaintiff, of which the said A, then sole, then and there had notice, and thereby became liable, and in consideration thereof then and there promised the plaintiff to pay him that sum, according to the tenor of said note; yet the said A, while sole, and the said A and B, since their intermarriage, though often requested, never paid the same, but wholly neglect and refuse so to do.

Indorsee v. Executor, on note of testator.

For that the said C, in his lifetime, on &c., at &c., by his note under his hand of that date, for value received, promised one B to pay him, or order, the sum of \$—, in &c. months from the date of said note, which are long since past; and the said B afterwards, on &c., at &c., by his indorsement of the same note, in writing under his hand, for value received, ordered the contents of said note, then unpaid, to be paid to the plaintiff, according to the tenor thereof, of which the said C, in his lifetime had notice, and thereby became liable, &c.; yet the said C, in his lifetime, and the said A, since the death of said C, have or hath never paid the same, &c.

On conditional note.

For that the said A at &c., on &c., by his note, in writing under his hand, of that date, for value received, promised the plaintiff to pay him, or his order, the sum of \$300 in six months from the date of said note, and that he would pay him \$200, part thereof, in printing, at the Boston customary price per sheet, and the remaining \$100 in cash; and the said A, in and by his note, further promised, that if he should be prevented, by any accident from paying him the said \$200, in work, as aforesaid, he would then pay him the said sum in cash, with lawful interest on the said \$300 until paid. Now the plaintiff avers, that the said A, though often requested, has never paid the said \$200, in work, as abovementioned, nor has he, though alike requested, paid the said sum of \$300 in cash, according to his promise, &c.

T. PARSONS.

On a note in the alternative, either to pay a sum of money or surrender the body of a person arrested; — 2 Counts.

For that the said B and C, on &c., at &c., by their note,

under their hands of that date, jointly and severally promised the plaintiff to pay him, or order, the sum of &c. for value received, or surrender the body of D to the action of the plaintiff, brought against said D. Now the plaintiff avers, that the said B and C or either of them, have not paid the said sum &c., nor have they, or either of them, surrendered the said D to the action of the plaintiff, according to the tenor of said note, though thereto, on &c., at &c., requested, but wholly refuse and neglect so to do. And for that one D, on &c., at &c., being indebted to the plaintiff in &c., for goods &c., the plaintiff for the speedier recovery and obtaining that debt, on &c., at &c., commenced his suit against said D, and declared, in a plea of the case to the damage of the plaintiff, and thereupon caused the said D to be arrested by the sheriff of &c., and the said D, being so arrested and in his custody, the said B and C, on &c., at &c., had notice thereof, and then and there, in consideration that the plaintiff, at the special request of the said B and C would discharge the said D out of the custody of the said sheriff, promised, jointly and severally, to pay the plaintiff or order the sum of \$—, on demand for value received, or surrender the body of said D to the custody of said sheriff to the same suit; and the plaintiff says, that, giving credit to the said promise of the said B and C, and at their request, he, the plaintiff, did then and there discharge the body of said D out of the custody of said sheriff, and then and there gave notice thereof to the said B and C, yet the said B and C, or either of them, though often requested, have never paid the said sum, nor have they, or either of them, surrendered the body of said D to the custody of said sheriff, according to their promises aforesaid, though on &c., at &c., thereto especially requested, but deny so to do. 3 *Ld. Raym.* 96.

6. Orders.

Payee v. Acceptor, on an order accepted.

For that one C, at &c., on &c., drew his order in writing, under his hand of that date, directed to the said D, therein and thereby requesting the said D to pay the plaintiff, or his order, the sum of &c. on demand, for value received of the plaintiff by the said C, and charge the same to the said C's account; and the plaintiff thereafterwards on the same day, presented the said order to the said D for his accept-

ance, who then and there duly accepted the same, whereby he became liable, and in consideration thereof promised the plaintiff to pay him that sum on demand; yet, &c.

Payee v. Drawer, on order not accepted.

For that the said D, at &c., on &c., for value received of the plaintiff, drew his order in writing, under his hand of that date, directed to one C, therein and thereby requesting the said C to pay the plaintiff, or his order, the sum of &c., on demand, and charge the same to the account of the said D; and the plaintiff on &c., at &c., presented the said order to the said C for his acceptance and payment, which the said C then and there refused to do, of which the said D then and there had due notice, and was requested to pay the same, whereby he became liable, and in consideration &c.

Against partners in favor of payee; on order drawn on a bank and not accepted.

For that the said D and E, at &c., on &c., by the name and firm of D and E, for value received of the plaintiff, drew their order in writing, on J K, cashier of the Essex Bank, and thereby directed him to present their note, made to the plaintiff for the sum of &c., signed by the said D and E, to the directors of the said bank, and thereby ordered and requested them to pay the plaintiff that sum; and the plaintiff avers, that said order was presented by said cashier to said directors, who refused to pay said sum or accept said order, whereof the said D and E there, on &c., had notice, whereby the said D and E became liable to pay the same sum to the plaintiff, on demand, and being so liable &c.

N. DANE.

NOTE. A check must be presented for payment, whether the drawee has *received funds* or not; but if the drawer has *withdrawn* the funds, it seems otherwise.

A check should be presented within the business hours of the day after that in which it is received. This is the rule adopted in England. See Chitty on Bills, 323.

If a check which payee has lost, is paid before it bears date, the bank is liable to pay it again to the payee, if it is contrary to the regular course of business to pay checks before they bear date. *Ibid.* 149.

A bank, which has paid a forged check to a *bona fide* holder cannot recal the payment. 4 Dall. 234.

A draft payable to A B or bearer, *but addressed to no one*, may be recovered against the drawer, by any *bona fide* holder for a valuable consideration, in an action for money had and received. 3 Pick. 18. See

also 1 *Mason*, 243. *Quære*, what privity is there in this case, to enable the holder to recover on the money counts against the drawer? But in New York it is settled, that a note payable to A B, or bearer, may be given in evidence, in an action by the holder against the maker, under the money counts. See 12 Johns. R. 90.

On an order (indorsed on the back of a note) requesting drawee to pay the note, and accepted by him.

For that one D D, son of the said D, at a place called Philadelphia, to wit, at S aforesaid, on &c., by his note under his hand of that date, for value received of the plaintiff, promised the plaintiff to pay him, or his order, at S aforesaid, the sum of £1300 [of our then lawful current money commonly called continental currency, of the value of £81 7s. 10d. of our now lawful money,] at or by the &c. day of &c., then next but now past, with lawful interest therefor until paid; and thereafterwards on the same day, the said D D, the son, being indebted to the plaintiff in manner aforesaid, in the said sum, for the payment of the same, drew his order in writing under his hand, on the back of the said note directed to the said D first named, his father, and therein and thereby requested the said D, the father, to pay to the plaintiff the sum aforesaid, according to the tenor of the same note; and the plaintiff afterwards, to wit, on &c., at S aforesaid, presented the said note, with the said order thereon, to the said D, the father, for his acceptance and payment of the said order, and the said D, the father, then and there accepted the said order, and promised the plaintiff payment thereof, on demand; yet though requested, the said D, the father, has never paid the said order or any part thereof, but unjustly refuses so to do.

And for that afterwards, on the same &c. day of &c. aforesaid, at S aforesaid, the said D, the father, being indebted to the plaintiff in another sum of [£150, lawful money] for so much money before that time, had and received by him to the plaintiff's use, in consideration thereof then and there promised the plaintiff to pay him that sum on demand; yet though requested, the said D, the father, has never paid the same, but unjustly refuses so to do.

Nichols v. Adams.

T. PARSONS.

7. *Bills of Exchange.*

Payee v. Acceptor.

For that one A B, on &c., at &c., made his certain bill of exchange, in writing of that date, directed to the said D,

and thereby requested the said D to pay to the said plaintiff, or his order, the sum of &c., three months after the said date, for value received, and then and there delivered the said bill of exchange to the plaintiff, which said bill of exchange the said D thereafterwards, viz. on &c., at &c., aforesaid, upon sight thereof accepted; by means whereof the said D, then and there became liable, and in consideration thereof, then and there promised the plaintiff, to pay him the sum of money specified in the said bill of exchange; according to the tenor and effect of the said bill of exchange, and of his acceptance thereof as aforesaid; yet though the said three months have long since elapsed, and though often requested &c.

NOTE. If the bill bears a wrong date by mistake, instead of, "of that date," say, &c. "bearing date by mistake the &c. day of &c., but intended to be dated the &c. day of &c.," and insert another count, as if the mistaken date was the true one.

If the bill is drawn by an agent, say, "for that one A B, by C D, his agent, in that behalf," on &c., at &c.

A mistake in the name of the drawer, in an action against the acceptor, or an indorser, will be a fatal variance. 3 Bos. and P. 559.

Where a bill or note bears no date, but is payable at a certain time after date, it may be declared on, as made on any day, when it can be proved to have been in existence; but it should not be alleged to bear any date, because from the variance, when the bill is offered in evidence, it will not appear to be the bill declared on. See 2 Show. 422, 3 Bos. & P. 173.

For the same reason, if a bill, dated at a particular place, is declared on, as dated at another place, the variance will be fatal.

It is best to omit the usual expression, "*his proper hand being thereto subscribed*," because, if the bill was drawn by an agent, there will be a variance. See 5 Esp. R. 180.

But, the prevailing doctrine at present is, that, if the bill was drawn by an agent, this expression would be rejected as surplusage.

In declaring on a bill or note made by a firm in their partnership name, a mistake in the name of either of the partners, will be cause of nonsuit, and not merely of abatement. 4 D. & E. 611; 1 Bos. & P. 72.

Where a bill, directed to several persons, is accepted by one only, it may be declared on as directed to that one only, or it may be stated according to the fact. If there is any misdirection or misspelling, it will be proper to state that the bill was directed to A B, (*the true name*) by the name or addition mentioned in the bill. See 1 Day's Rep. 11.

It is unnecessary to allege expressly, that the drawer *delivered the bill to the payee*, because, in an action against the drawer or acceptor, a delivery is included in the allegation that he made it; however it is usual and proper; and where the suit is brought by the holder of a bill, payable to bearer, a delivery should be alleged. Where a bill of exchange is accepted, payable at a particular place, in an action *against the acceptor*, it is not necessary to allege, that it was presented there for payment. His acceptance prevents the necessity of such allegation. See 2 Camp. 656; 1 Camp. 423.

If a bill, after acceptance is negotiated by the payee or any other

holder, and afterwards returned to him, it is unnecessary to state in the declaration, that he had parted with the bill, and that it was returned to him; he may state merely his former title. 7 D. & E. 572.

Where one of several drawees, accepts for himself and the others, it may be alleged so, or that the drawees accepted.

Where two drawees accept a bill of exchange, they may be sued jointly or severally. See 7 D. & E. 596, 597. Lawes on Assumpsit, 337.

In actions against *acceptors*, an acceptance must be stated, but this is not necessary in actions against other parties.

A special acceptance must always be stated according to the fact; since a general acceptance would not support it; and, if it was made by parol, it would not be safe to state it as made in writing.

Where a bill is made payable to a fictitious person, or order, if the acceptor did not know that fact, the bill is wholly void. 1 Camp. 130, 180.

A bill of exchange, promissory note, &c., payable to a man's order, may be declared on, as payable to him, merely, or as payable to his order, or, as payable to him or his order. Bayley on Bills, 105; Lawes on Ass. 332; See 1 Wils. 190.

If a note is "for value received," and these words are omitted in the declaration, it is not a variance, nor is it material. But if those words are stated in the declaration, but the bill or note does not contain them, it will be a fatal variance. If the words in the note are, "for amount received," but the declaration is "for value received," and the latter words, from the rest of the declaration, appear to be a precise description of the note, it may perhaps be a variance; but if it is apparent, that those words are intended only to convey the import or legal effect of the note, they may be sufficient. See 2 L. Ray. 1543; 2 Bos. & P. 78.

If after acceptance, the acceptor should detain the bill, the payee may sue him on it, and having given him notice to produce it, may give parol evidence of its contents, if it is not produced. 5 East's R. 476.

When there is a mistake in the bill of exchange, and the sum expressed in the body of it, differs from the figures in the margin, it is proper to have two counts, adapted accordingly. This should be done also in every case, where the legal operation of the bill is supposed to vary from its apparent import.

In declaring on a bill, accepted after the time of payment has elapsed, the declaration should state, that the defendant accepted and promised to pay the bill, omitting the words, "according to the tenor." Lawes on Assumpsit, 338.

Payee v. drawer, on default of acceptance.

For that the said E, on &c., at &c., made his certain bill of exchange in writing, of that date, and then and there directed the said bill to one A B, and therein and thereby requested the said A B, three months after the date thereof, to pay to the plaintiff, or order, the sum of &c., for value received, and then and there delivered the said bill to the plaintiff; and the plaintiff avers, that afterwards, and before the payment of the said sum of money specified in the said bill, viz. on &c., at &c., the said bill of exchange was presented and shown to the said A B for his acceptance thereof, and the said A B, was then and there required to accept the

same ; but the said A B did not then, or at any time since, accept or pay the same, but then and there wholly refused so to do ; of all which said several premises, the said E afterwards, *viz.* on &c., at &c., had notice ; by reason whereof the said E became liable, and in consideration thereof, then and there promised the plaintiff to pay him the said sum of money specified in the said bill, when thereunto afterwards requested ; yet, though often requested, &c.

NOTE. Where a blank is left in a bill of exchange for the name of the payee, any *bona fide* holder may fill the blank with his own name ; the drawer impliedly gives an authority for this purpose, by leaving the blank. 2 M. & S. 90.

If non-acceptance is alleged in the declaration, there is no necessity to aver a presentment for payment ; the right of action commences immediately after the refusal to accept. 3 Johns. R. 202.

Though it is unnecessary to state a protest on inland bills of exchange, if stated, it must be proved. See 2 Esp. R. 550.

In an action against the drawer of a bill of exchange, it is necessary to show either that the bill was presented, and that the drawee refused to accept or pay ; or that he was not found ; or that he had left the country ; or that, if the defendant had paid the bill, he would have had no remedy against the drawee. Bayley, 108.

So in an action on a promissory note against an indorser.

These excuses for not presenting the bill, must be alleged according to the fact, for the allegation of one of them may not be supported by proof of another. *Ibid.* 2 D. & E. 719.

If the holder of a bill neglect to give due notice to the drawer or indorser, of non-acceptance or non-payment, this neglect may be waived by such drawer or indorser ; and a subsequent promise by either, with a full knowledge of all the facts, will cure the omission as respects him. See 7 East's R. 236 ; 5 Johns. R. 375.

Averments to excuse the want of notice of refusal to accept, &c.

That drawee had no effects of drawer in his hands.

And the plaintiff avers, that at the time of making the said bill of exchange, and from thence, until and at the time when the same was so presented and shown to the said A B for his acceptance thereof as aforesaid, the said A B had not in his hands any effects of the said D nor had he received any consideration from the said D for the acceptance or payment by him, the said A B, of the said bill of exchange, nor hath the said D sustained any damage, by reason of his not having had notice of the non-acceptance by the said A B of the said bill of exchange ; of all which, the said D thereafterwards, *viz.* on &c., at &c., had notice ; and by reason thereof become liable, &c.

NOTE. What will and what will not excuse the want of presentment and notice. See Law Summary, 196.

Averment to excuse want of presentment for acceptance.

That drawee could not be found.

And the plaintiff avers, that afterwards, and before the payment of the said sum specified in the said bill, viz. on &c., at &c., and at divers other times, between that day and the time when the said bill became due, and also when the said bill so became due, viz. on &c., at &c., diligent search and inquiry was made after the said A. B. at &c. and elsewhere, in order that the said bill might be presented to the said A. B. for his acceptance and payment thereof; but that the said A. B. could not, on such search and inquiry, be found; nor hath the said A. B. at any time hitherto accepted the said bill, or paid the said sum of money therein specified; of all which the said D afterwards, viz. on &c., at &c., had notice and thereby became liable, &c.

Averment to excuse want of presentment for payment.

That defendant had dispensed with presentment for payment.

And the plaintiff saith, that afterwards when the said bill of exchange became due, viz. on &c., at &c., he was ready and willing to present the said bill to the said A. B. for payment thereof, and to demand of him the sum therein specified, and would have presented the same and demanded payment thereof accordingly, viz. on &c., at &c., whereof the said E then and there had notice; but the said E then and there requested the plaintiff not to present the said bill to the said A. B. for payment thereof, and then and there wholly dispensed with, and discharged the plaintiff from the presentment of the said bill to the said A. B. for payment thereof; by means whereof, after the said bill became payable according to the tenor thereof, viz. on &c., at &c., the said E became liable, and in consideration, &c.

NOTE. On the subject of presentment, for payment, refusal to pay and notice, &c. See Law Summary, 211. (2d Edition.)

If a bill is drawn payable on demand, or at a certain time from date, there is no obligation on the holder to present it for acceptance; but when it becomes due, he may present it for payment, and if not then paid, he may at once, or where protest is necessary, after protest and notice, actual or constructive, proceed against the parties who precede himself on it. But if it is presented immediately by the holder, as soon as it comes to his hands, which is the better course, and is then refused acceptance, he is under no obligation to wait till the bill is payable, but may call on the other parties at once for payment.

But with regard to bills payable at or after sight, the rule is, to use reasonable diligence in presenting them for acceptance; and, as it is the interest of the holder, to get his money as soon as he can, and this depends upon the time of presentment, it might naturally be supposed, that there would be little need for any regulation in this respect. Questions however not unfrequently arise, whether the holders of such bills, have used reasonable diligence in presenting them for acceptance. And it seems, in general, if the holder should lock up the bill, and keep it by him a considerable time, without presenting it for acceptance, there would be such laches as would discharge the drawer. But, if instead of presenting it or locking it up, he were to negotiate it, and it should pass from hand to hand a long time before presentment for acceptance, there might be no such laches. See 7 Taunt. 162, 397; 2 Hen. Bl. 565.

A bill should be treated as dishonored, if not accepted within twenty-four hours after sight; but, if expressly refused acceptance within that time, the holder need not wait for their expiration.

An agreement to accept a bill not in existence, is not an acceptance. See, however, 4 Camp. 393. But a promise to accept a bill already drawn, is an acceptance. 3 Bur. 1669; 5 East, 521.

If a bill payable *after date*, is presented for acceptance, and this is refused, though the holder was under no obligation to present it until due, yet in that case he must give immediate notice to such of the parties, as he means to look to for payment. See Chitty on Bills, 196, 197.

A bill or note payable at a third person's house, is dishonored by a refusal there. 1 Esp. N. P. C. 3.

Where a place of payment is mentioned in the body of a bill or note, it must be presented there for payment; but if the place is merely mentioned in a memorandum at the foot of the note, it is unnecessary; because the memorandum constitutes no part of the contract. 4 M. & S. 525; 16 East, 110; 5 Taunt. 30.

The jury may presume from part payment of a note after it is due, or from a promise to pay, that the note has been properly presented and notice given; and in cases where a protest is necessary, are at liberty to infer, that a protest has been regularly made. See 13 East, 417; 1 Taunt. 12.

A promise to accept a bill to be drawn afterwards, is an acceptance as respects any person who is led by such promise to take the bill. See Cowp. 572; 1 East, 98; 4 East, 57.

Where a bill is payable in parts, in an action against the drawer, it is recommended, in declaring on one of the parts, to allege that the others have not been paid. But this, if necessary, can be so only because of the expression in the bill, which is drawn in sets or parts, which are payable only in case the other parts are not paid. For otherwise, there can be no necessity for any such allegation, since all of them together, constitute but one order for the payment of a certain sum of money; and when one is accepted and paid, the rest are satisfied.

Drawer against acceptor. The bill paid after protest, by a third person to whom the drawer was obliged to pay the principal with charges, &c.

For that the plaintiff at &c., in parts beyond seas, viz. on &c., at &c., made his certain bill of exchange of that date, directed to the said D, and thereby requested the said D at two usances, viz. two calender months after the date thereof, to pay to one E F, or order, the sum of &c., value received,

which said bill the said plaintiff then and there delivered to the said E F, and the said E F thereafterwards on the same day, indorsed and delivered the said note to one G H, which said bill the said D afterwards, viz. on &c., at &c., upon sight thereof, accepted according to the usage of merchants; and the plaintiff avers, that afterwards, viz. on &c., at &c., the said G H caused the said bill so accepted and indorsed as aforesaid, to be presented to the said D for payment thereof, and then and there required the said D to pay the sum of money therein specified, according to the tenor and effect of the said bill, and of his acceptance thereof, and of the said indorsements thereon; but the said D did not then or at any other time whatsoever, pay to the said G H the sum of money specified in the said bill, but then and there wholly refused so to do; whereupon the said bill of exchange afterwards, viz. on &c., at &c., was protested for the non-payment thereof; and afterwards, viz. on &c., at &c. one K L appeared before M N, then being a notary public, by lawful authority admitted and sworn, dwelling at &c., and the same by whom the said bill of exchange was so protested, and then and there declared before the said notary, that he would pay the said bill under the said protest, for the honor and on the account of the plaintiff, the drawer of the said bill, holding the said drawer and the said acceptor, and all others whom it might concern, always obliged unto him, the said K L, for his reimbursement; and thereupon the said K L then and there paid the said bill, according to his said declaration, together with the charges of protest, amounting to the sum of &c., and afterwards, to wit, on &c. at &c., the said K L returned the said bill so protested, to the plaintiff; and the said plaintiff was then and there obliged to pay, and did pay to the said K L for the said bill, and for the exchange and re-exchange of the money therein contained, and the charge of protest, commission, and other charges attending the said non-payment of the said bill, a large sum of money, viz. the sum of &c., of all which premises the said D afterwards, viz. on &c., at &c., had notice, and by reason thereof became liable, and in consideration thereof, then and there promised the plaintiff to pay him the said last mentioned sum of &c., (so paid to the said K L by the plaintiff as aforesaid,) when thereunto afterwards requested; yet, though often requested, &c.

NOTE. If a bill drawn on two or more, is accepted by one only, or if it is accepted for part only of the sum specified, or if the drawee cannot

be found it should be protested for non-acceptance. Com. Dig. Merchant, (F. 8.)

Drawer v. Acceptor, on bill payable to plaintiff or order.

For that the plaintiff, on &c. at &c., made his certain bill of exchange of that date, directed to the said D, and thereby then and there requested the said D, three months after the date thereof, to pay the plaintiff or his order, the sum of &c., for value received, which said bill, the said D afterwards, *viz.* on &c., at &c., upon sight thereof accepted; by means whereof the said D became liable, and in consideration thereof, then and there promised the plaintiff to pay him the sum of money specified in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof; yet, though the said three months have long since elapsed, and though often requested, the said D hath never paid, &c.

NOTE. Where a bill is payable to the drawer's order, it is not unusual to insert an averment, that the drawer made no order, but this is unnecessary. Bayley, 190; 5 East's R. 476.

Drawer v. Acceptor. On a bill taken up by the drawer after acceptance.

For that the plaintiff, on &c. at &c., made his bill of exchange of that date, directed to the said T, and thereby requested the said T, three months after the date, thereof, to pay Mr. C E or order, the sum of &c., for value received, and then and there delivered the said bill to the said C E, which said bill the said T, thereafterwards, *viz.* on the same day, upon sight thereof, accepted; and the plaintiff avers, that afterwards when the said bill became due, according to the tenor and effect thereof, *viz.* on &c., at &c., the said bill was presented to the said T for payment thereof, and the said T was then and there requested to pay the sum of money specified therein, according to the tenor and effect of the said bill, and of the said T's acceptance thereof; but the said T did not pay the said sum, nor hath he since paid it, but then and there wholly refused to pay the same; and thereupon the said bill was then and there returned to the plaintiff for non-payment thereof, and the said plaintiff was then and there forced to pay to the said C E (*or other holder, if the fact be so*) the sum specified in the said bill; whereof the said T had notice, and by reason thereof became liable, and in consideration thereof then and there promised the plaintiff, to pay him the sum of money specified in the said bill, when thereunto afterwards requested; yet, though often requested, &c.

NOTE. If the acceptance varies from the bill, in time or place of payment, or is on a contingency, it should be stated in the declaration agreeably to the fact, and there must be an averment of a presentment or of the happening of the contingency accordingly.

In an action, by a drawer against an acceptor, on a bill made payable to a third person, the declaration should allege a presentment for payment, and also that the bill was returned to the drawer for non-payment and notice of that fact, to the defendant. *Laves on Assumpsit*, 368.

Second Indorsee v. Acceptor.

For that whereas one A B, on &c., at &c., made his certain bill of exchange of that date, directed to the said E, and thereby requested the said E, two months after the date thereof, to pay one C F or order, the sum of &c., for value received, and then and there delivered the said bill to the said C F, which said bill the said E, thereafterwards, *viz.* on the same day, on sight thereof accepted according to the usage of merchants; and the said C F thereafterwards on the same day, (*state the date of the indorsement, if there be any*) indorsed the said bill, then and still unpaid, and then and there delivered the same to one R S, and the said R S thereafterwards, *viz.* on the same day, indorsed the said bill, then and still unpaid, and delivered the same to the plaintiff; by means whereof the said E became liable, and in consideration thereof, then and there promised the plaintiff, to pay him the sum of money specified in the said bill, according to the tenor and effect of the said bill, and of the said E's acceptance thereof, and of the said indorsements thereon; yet, though said two months have elapsed, and though often requested, &c.

NOTE. A count for a first or any other indorsee, may be easily made from the foregoing, by omitting one of the statements of indorsement, or adding others.

An executor or administrator may indorse the bills or notes of his intestate or testator. *Str.* 1260.

If a bill or note is payable to several persons who are not partners, they must all indorse. *Doug.* 653, n.

Where the indorsement is by a partnership, to avoid the risk of a variance, use these expressions;—"And the said G H, I K, L M, thereafterwards, *viz.* on the same day, at &c., indorsed the said bill with the style of their partnership aforesaid, and delivered the same to the plaintiff, &c.

If the indorsement is by an agent, say, "and the said A B (*the principal*) thereafterwards, on the same day, by his agent in this behalf, indorsed and delivered the said bill to the plaintiff, &c.

Indorsee v. Drawer, the acceptor not having paid.

For that the said E, on &c., at &c., drew his certain bill

of exchange of that date, directed one E F, and thereby requested the said E F, three months after the date of the said bill, to pay to one G H, or his order, the sum of &c. for value received; and the said G H thereafterwards, viz. on the same day, indorsed and delivered the said bill, then and still unpaid, to the plaintiff; and the plaintiff avers that afterwards, viz. on &c., at &c., the said bill was presented to the said E F for payment thereof, and the said E F was then and there requested to pay the sum of money specified therein, according to the tenor and effect of the said bill and of the said indorsement thereon; but the said E F did not then pay the said sum, nor hath at any time since paid the same, but wholly refused so to do; of all which said several premises the said E, thereafterwards, viz. on the same day had notice; by means whereof the said E became liable, and in consideration thereof then and there promised the plaintiff, to pay him the sum of money specified in the said bill when thereunto afterwards requested; yet though requested, &c.

NOTE. In a case like the above, it is best not to state an acceptance by the drawee, for though unnecessary, if stated, it must be proved. Bayley, 188; 2 Camp. 474.

However, if the bill is payable after sight, or the acceptance is special, or varies from the tenor of the bill, in the mode or place, or time of payment, or in other respects, the acceptance should be stated.

In an action, brought by the indorsee of a negotiable instrument, the declaration should show that the instrument contained words authorizing a transfer. Otherwise it will be bad; because if there are no such words, the holder can maintain no action in his own name; and if there are such words, but they are not set out in the declaration, there will be a variance.

Where part of the amount of a bill or note, has been paid before indorsement for the balance, the indorsee, in his declaration, should show or acknowledge payment of that part. 1 Ld. Raym. 360.

In an action by a remote indorsee, he may, in his declaration, omit the intermediate indorsements, between himself and the indorsers, against whom the suit is brought, and, at the trial, strike out the names not noticed in the declaration; but then he will lose his remedy against those indorsers, whose names are so struck out. But it is absolutely necessary to state the first indorsement, as also the indorsement of the party sued; and whatever indorsements are alleged in the declaration, must be proved. It will be best, in every case, therefore, to omit in the declaration all notice of indorsements, which cannot be proved. See 4 Esp. R. 210.

If a bill of exchange is indorsed before payable, but after part of it has in fact been paid, this will not affect an indorsee, who was ignorant of the payment. 1 Esp. N. P. C. 463.

Indorsee v. Indorser.

For that one A B, on &c., at &c., made his certain bill

of exchange of that date, directed to one E F and thereby requested the said E F three months after the date of the said bill, to pay to one G H, or order, the sum of \$—, for value received, and then and there delivered the said bill to the said G H; and the said G. H. thereafterwards, *viz.*, on the same day indorsed the said note, then and still unpaid, and delivered the same to the said E, who thereafterwards, *viz.* on the same day, indorsed and delivered the said bill to the plaintiff; and the plaintiff avers that afterwards, *viz.*, on &c., at &c., the said bill of exchange was presented to the said E F for payment thereof, and the said E F was then and there requested to pay the sum of money, specified therein, according to the tenor and effect of the said bill of exchange; but that the said E F did not then pay the said bill, nor hath since paid the same, but then refused and hath since wholly refused so to do; of all which several premises the said E afterwards, *viz.*, on &c., at &c., had notice; by reason whereof the said E became liable, and in consideration thereof, then and there promised the plaintiff, to pay him the sum of money specified in said bill, when thereunto afterwards requested; yet, though often requested, &c.

NOTE. In an action against an indorser, acceptor, or drawer of a bill of exchange, or against an indorser or maker of a promissory note, notice of indorsement is not necessary to be alleged; but notice of non-payment of a note, or non-payment or non-acceptance of a bill of exchange, is indispensable. See 1 Bos. & P. 625.

But in *Kinsley v. Robinson*, it was held, generally, that the drawer of a bill of exchange having no effects of the acceptor in his hands, from the time when the bill is drawn, to the time when it becomes due, is liable without demand and notice of non-payment.

In the same case the acceptor was held to be a competent witness to prove the want of funds. 21 Pick. 327.

A note or bill, it should be recollected, must be presented for payment on the third day of grace, unless that should happen to be Sunday, or other *dies non juridicus*, in which case the presentment should be made on the second day of grace.

A presentment for payment, where necessary, must be alleged to have been made at the time when, and the place where, the bill or note became due; otherwise it will be bad. Doug. 679. Going with the bill or note to a man's place of business, in business hours, and finding it shut, without more, is using sufficient diligence. See *Shed v. Brett*, &c. 1 Pick. 414.

It has been recommended by some to say "and thereafterwards, when the said bill of exchange became due and payable, *viz.*, on &c., at &c., the said bill of exchange was shown and presented to the said G. H. for payment; others recommend that it should be expressed thus; "and afterwards, *viz.*, on &c., at &c., the said bill was presented and shown to the said G H for payment," &c. The latter seems the better, as being more concise, and because, if the bill was presented on the proper day,

it may be shown in evidence, in this way of declaring, though the day of presentment should be incorrectly set out under the *viz.*, as well as under the former.

It should be remembered that the indorsee of an accommodation note, who receives it, knowing it to be such, can recover no more than the amount he has actually paid upon it. 1 Esp. R. 261.

Where a bill is payable in a foreign currency, the declaration should contain an averment of the value of the currency. 3 Dal. 365.

So if a bill is payable at usance, the length of the usance should be averred. The omission is bad on special demurrer. Lawes on Assumpsit, 375.

Where the plaintiff brings his action against the party, from whom he receives the instrument, he may, at discretion, introduce any of the common counts suited to the precise consideration, for which he received the note. But this is useless, where the suit is against a party, between whom and the plaintiff, there is not a similar privity.

With regard to what is sufficient notice of the dishonor of a bill or note to charge an indorser, it should be observed as a general rule, that an *indorser*, where he does not waive it himself, is entitled to seasonable notice in all cases. The only exception, and it is very doubtful how far it will do to rely on this, is where the indorser is the real debtor, and the drawer or maker, merely signs to assist his credit, or for his accommodation. 4 Cranch, 141; 11 Johns. R. 180. In this case, if notice should not be given of the dishonor of the bill or note, perhaps the indorser might still be liable. But the reason which perhaps would have most weight with the Court, would be, because, if the indorser were not held, still, if the maker or drawer was obliged to pay the bill or note for the indorser, the indorser would be liable to refund the amount, in an action to be brought by such drawer or maker. To decide, therefore, that the indorser would not be liable to an action by the holder of a note, &c., without notice of its dishonor, in such a case would merely lead to circuity of action.

If the promisor refuses to pay on demand, on the day when the note falls due, or is not to be found at his place of business, and no one is there to answer for him, the bill or note is dishonored; and the holder, having sent notice to the post-office of the dishonor of the bill or note, may commence an action, before the expiration of that day, and before it is possible for the indorser to have received *actual* notice. See *Shed v. Brett*, 1 Pick. 401.

A personal demand by an agent, having the note with him, is sufficient, without any authority in writing. *Ibid.*

But in an action by an indorsee of a note against the indorser, where each had a place of business in the same town, and the writ was served on the indorser on the day the note became due, but before notice given, it was held, that the action was prematurely brought, although notice was given afterwards by a notary on the same day. *New England Bank v. Lewis*, 2 Pick. 125.

If a drawer or indorser receives due notice of its dishonor from any party to a bill, he is directly liable upon it to any subsequent indorser from whom he has received no notice. 2 Camp. 373.

Ignorance of the drawer's residence, if proper inquiry is made, is a sufficient excuse for not sending notice; and the same reason applies to an indorser. See 1 Gow. 81.

Drawer v. Acceptor, on a foreign bill.

For that the plaintiff at Z, in parts beyond seas, *viz.*, at &c., on &c., made his certain bill of exchange, of that date, directed to the said E, and thereby requested the said E, at two usances, that is to say, two calendar months after the date of that, his second of exchange (first and third of the same tenor and date not being paid,) to pay to the plaintiff, or order, the sum of — ducats, value received; which said bill of exchange the said E afterwards, *viz.* on &c., at &c., upon sight thereof accepted, according to the usage of merchants; by means whereof the said E became liable, and in consideration thereof, then and there promised the plaintiff to pay him the sum of money specified in the said bill of exchange, according to the tenor and effect thereof, and of the said E's acceptance thereon; and the plaintiff avers, that the said — ducats, at the time when the said bill of exchange was made, and also at the time when the same became due, were of great value, *viz.* of the value of \$—, of the lawful money of this commonwealth, *viz.* at &c. aforesaid. Yet, though the said two usances have long since elapsed, and though often requested, &c.

Indorsee against drawer, drawee refusing acceptance, with statement of protest.

For that the said D, on &c., at &c., in parts beyond seas, *viz.* at &c., made his certain bill of exchange of that date, directed to one A B, and therein requested the said A B, two months after the date of that his, the said D's, second of exchange, (first and third of the same tenor and date, not paid,) to pay to one E F or order, the sum of \$—, value received, and then and there delivered the said bill to the said E F and the said E F thereafterwards, to wit, on the same day, indorsed and delivered the said bill to the plaintiff; and the plaintiff avers, that afterwards, *viz.* on &c., at &c., the said bill of exchange, then and still unpaid, was presented to the said A B for his acceptance thereof, and the said A B was then and there requested to accept the same, according to the usage of merchants, but that the said A B did not, at the said time, when the said bill was presented as aforesaid, nor at any other time accept or pay the same, but then and there wholly refused so to do; whereupon the said bill of exchange, thereafterwards, *viz.* on &c., at &c., was duly protested for non-acceptance thereof; of

all which said several premises the said D afterwards, *viz.* on &c., at &c., had notice; by means whereof the said D became liable, &c., &c.

NOTE. In Massachusetts, Pennsylvania, South Carolina, and in the Circuit Court of the United States, it has been settled that a bill of exchange, drawn by a person in one of the United States on a person residing in another, is a foreign bill of exchange, and consequently, and therefore a protest is necessary to charge the drawer. See *Phillips & Sewall's Edition of Bayley on Bills, where the cases are collected*, p. 21.

By drawers who accepted upon protest for non-payment, against an indorser, for whose honor he accepted.

For that one A B on &c., at &c., drew his certain bill of exchange of that date, directed to the plaintiff, and therein requested the plaintiff to pay one C E or order, the sum of \$—, two months after date, for value received; and then and there delivered the said bill to the said C E, who, thereafter on the same day, indorsed and delivered the said bill to one E F, who thereafter on the same day, indorsed and delivered the said bill to the said E, who thereafter on the same day, indorsed and delivered the same bill to one G H; and the plaintiff avers, that afterwards, *viz.* on &c., at &c., the said G H caused the said bill of exchange to be presented to the plaintiff for payment thereof, and the plaintiff was then and there required to pay the sum of money specified therein, according to the tenor and effect of the same, and of the said indorsements thereon, but which the said plaintiff then and there refused to do; whereupon the said G H, on &c., at &c., caused the said bill of exchange to be duly protested for the non-payment thereof; and thereupon the plaintiff afterwards, *viz.* on &c., at &c., upon the said protest, and for the honor of the said E, so indorser of the said bill as aforesaid, paid to the said G H the sum of money specified in said bill, together with a large sum of money, *viz.* the sum of \$— for the costs of the protest, and charges attending the non-payment of the said bill of exchange, and noting the same; nevertheless the said D and the said drawer, and all others whom it might or may concern, always obliged unto the plaintiff for his reimbursement in due form of law; of all which said several premises, the said E, afterwards, *viz.* on &c., at &c., had notice, and by reason thereof became liable, and in consideration thereof, then and there promised the plaintiff, to pay him the sum of money specified, in the said bill of exchange, and the costs of protest and charges, so paid by the plaintiff as aforesaid,

when the said E should be thereunto requested, yet though requested, &c. *Add a count for money paid to the defendant's use.*

NOTE. Where a bill of exchange is taken up, for the honor of any of the parties, the person taking it up becomes as an indorsee for a valuable consideration, and is entitled to the same remedies against any of the preceding parties, and is not confined to an action against the person, for whose honor the bill is taken up. 1 Esp. 113.

Indorsee v. Acceptor, where indorsers were partners.

For that, at the several times hereinafter mentioned, the plaintiff and the said R [acceptor] and B and C and K, were persons residing, trading, and using commerce, *viz.* the said B at &c., in parts beyond sea, and the plaintiff, the said R, and the said C and K in this commonwealth, and the said C and K were partners jointly negotiating in trade, under the firm of C and Co., and being so partners, the said B, at &c., on &c., made his certain bill of exchange in writing under his hand of that date, according to the usage of merchants, directed to said R by the name &c., and thereby requested the said R, — days after date, to pay to said C and K, by the name and style of C and Co., or order, the sum of &c., value received as by advice; which said bill the said R, afterwards, on &c., at &c., accepted and thereafterwards, on the same day, the said C and K, in the name and style of their firm and partnership, indorsed the said bill, the said name of said C and Co. being thereto subscribed by one of them, and by that indorsement, appointed the contents to be paid to the said plaintiff; of which said indorsement the said R then and there had notice; whereby he became liable, &c. 3 *Morg.* 55.

Indorsee v. Acceptor, for honor of drawer.

For that one E &c., at &c., on &c., according to the custom of merchants, made his certain bill of exchange, under his hand in writing, of that date, directed to one H, and thereby requested the said H, at — day's sight, to pay one P, or order, the sum of &c., and afterwards, on &c., at &c., the said P, by his indorsement under his hand, on the same bill, appointed the contents thereof to be paid to the said W, [plaintiff] which said bill the said W, afterwards, on &c., at &c., presented to the said H for acceptance, but the said H then and there wholly refused to accept the same &c., and afterwards, on &c., at &c., the said W presented the said bill, the same being then payable, to the said H for pay-

ment and the said H, then and there refused to accept the same, whereupon the said W, then and there duly protested the same bill according to the custom of merchants, of all which the said R [defendant] then and there had notice; and thereupon the said R, then and there, in order to prevent the said bill from being sent back and returned, under protest, to said E, accepted the same bill for the honor of the drawer and thereby became liable, &c. 1 *Went.* 315.

Indorser for honor of Drawer v. Drawer.

For that the said A, [defendant] at &c., on &c., according to the custom of merchants, made his second bill of exchange of that date, directed to one C, and thereby requested the said C, at &c. days' sight of the second bill, the first being then unpaid, to pay to T or order, the sum of &c., for value received, and place &c.; and afterwards, on &c., at &c., the said T presented the same bill to the said C for acceptance, and the said C then and there refused to accept the same, of which the said A then and there had notice; and the plaintiff thereafterwards, on the same day, at the special request of the said A, and to give credit to the said second bill of the said A, and in honor of him, according to the custom of merchants, indorsed the said bill by writing his, the plaintiff's name, on the back thereof, whereby he became liable to pay the same, if not paid by said C, and duly protested therefor; and the plaintiff in fact says, that afterwards, on &c., at &c., the same bill with the indorsement thereon was presented to the said C, and the said C was then and there requested to pay the same, the — days, limited for the payment thereof, being elapsed since the same bill was protested for non-acceptance, but the said C then and there refused to pay the same, the said A's first bill being unpaid; by reason whereof the said second bill was then and there duly protested, according to the custom of merchants, and by reason of the premises the said A, as well as the plaintiff, severally became chargeable to repay the said T the sum of &c., with interest and damages, immediately upon sight of said second bill so protested, of all which premises the plaintiff had notice, and thereby became liable and then and there paid the said T the sum of &c., with interest and damages, of which the said A thereafterwards on the same day, had notice, and thereby became liable, &c.

Indorsee or Executrix of Payee v. Drawer.

For that the said A, [defendant] at &c., on &c., made his certain bill of exchange, under his hand in writing of that date, directed to one C, and thereby requested the said C, by the name, &c., to pay the said E in --- days after date thereof, the sum of &c., value received, without further advice, which said bill the said C then and there accepted; and afterwards on &c., at &c., the said E died, having first duly made his last will and testament, and thereby appointed one Q, sole executor of the same, who thereafter, on the same day, duly proved the same, and took upon himself the burthen of the execution thereof; and thereafter, on the same day, the said Q, as such executor, by his indorsement of his name, in writing on the same bill, appointed the contents thereof to be paid to the plaintiff, and afterwards, on &c. at &c., the same bill, the same being then payable, was presented to the said C for payment thereof, and the said C was then and there requested to pay the same, but the said C then and there wholly refused to pay the same; whereupon the said bill was then and there duly protested therefor, of all which the said A, thereafter, on the same day, had notice, and thereby became liable, &c. 1 *Went.* 305; 3 *Wils.* 1; 1 *T. R.* 487.

8. On Policies of Insurance.*For a total loss on a Policy of Insurance on ship.*

For that the plaintiff on &c., at &c., caused to be made a policy of insurance, wherein is contained that the plaintiff, as well in his own name, as in the names of all and every other person or persons, to whom the same did then, might or should appertain, in part or in all, did make assurance, and cause himself and every of them to be insured, lost or not lost, the sum of &c. upon the ship A, and her appurtenances, from &c., to &c., and thence to &c., (*adopting the language of the policy with no other change than the substitution of the past for the present tense*) of which policy of insurance, as above set forth, the said E thereafter, on the same day had notice, and in consideration that the plaintiff had, then and there, paid the said E the premium of &c., according to the tenor of the said policy, and promised to perform all things contained in the writing aforesaid, on the said plaintiff's part to be performed, the said E then and there became an insurer of the said vessel for the voy-

age aforesaid, according to the tenor and effect of the said policy, for the sum of &c., to be assured by the writing aforesaid, being the sum subscribed to said writing; and the said vessel, on &c. upon the high seas, by storms and violence of the seas, upon the aforesaid voyage from &c., to &c., was sunk and utterly lost;* of all which the said E, on &c., at &c., had notice and proof; and although the plaintiff has performed all things by virtue of the said policy, on his part to be performed, yet the said E has not paid the plaintiff the said sum of &c., though often thereunto requested, &c.

NOTE. The above precedent seems to be defective, because it contains no averment of the plaintiff's interest; some however have made a question whether it can be necessary to have such an averment in any case. But if the plaintiff has no interest, he cannot recover; and if he makes no averment of it, what reason is there for intending that he is interested, and what becomes of the distinction between policies where a real interest is covered, and merely wagering policies? It will therefore be proper to insert an averment of the plaintiff's interest at the mark * in the above form, which may be in the following terms; "and the plaintiff avers, that his interest in the said ship so assured as aforesaid, at the time of making the said policy of insurance, as also at the time of the happening of the said loss, amounted to a large sum of money, viz. to the sum of &c., insured as aforesaid."

By plaintiff for administrator, for the use of an intestate's estate.

For that, on &c., at &c., the plaintiff to and for the use and benefit of the estate of V, deceased, according to the custom of merchants, caused to be made a certain writing or policy of insurance, purporting thereby and containing therein, that the plaintiff for the estate of V, deceased, did make assurance, &c. [*as in the policy;*] and the said B, [defendant] then and there subscribed the said policy as such assurer, for \$—, and afterwards on &c., the said brig was in good safety at Leith, in Scotland, her port of discharge there in said policy mentioned, and thereafterwards, on the same day and year, the said brig with divers goods and merchandises on board, of the value of \$—, departed and sailed from said Leith, upon her intended homeward bound voyage, from thence to New York, in the United States; and the plaintiff avers, that one E V, in her capacity of administratrix of the estate of the said V, deceased, then and from thence until and at the time of the loss herein after mentioned, was interested in said brig, and in the freight of said brig, to the amount of all the moneys by her insured, or caused to be insured thereon; and that the

said insurance so made as aforesaid, in the name of the plaintiff, was made for, and on the account of said E V in her said capacity, and for the benefit of the estate of said V, deceased, to wit, at S aforesaid, and the plaintiff avers, that the said brig with the said goods and merchandises on board of her, after her departure from said Leith, and whilst she was sailing from thence, upon and before the completion of her homeward bound voyage, in the said policy of assurance mentioned, to wit, on &c., by and through the violence of the winds and waves, and by the perils and dangers of the seas and tempests was greatly damaged, disjointed, and rendered leaky, her quarter boards stove in, her sails and rigging blown to pieces, whereby the said brig was totally disabled from proceeding on her said voyage, without being repaired, and in consequence thereof, and for the purpose of such repairs, and for the safeguard and preservation of said brig and cargo, was forced to be piloted and conveyed, during her distress, into a port, viz. Norfolk, in Virginia, and there unloaded, reloaded and repaired; and, on that occasion, the plaintiff, by his agents and servants, did labor in, and about the safeguard and preservation of said vessel and cargo, and in so doing, and in repairing the damages aforesaid, of said vessel, and of the premises, did necessarily expend the sum of &c., to wit, at S aforesaid, on &c., whereby the said B by force of the policy aforesaid, and of his promises aforesaid, became liable to pay the plaintiff \$—, being the rateable proportion of the expenses and charges aforesaid, which the said B ought to have paid and contributed in respect to the assurance aforesaid, whereof the said B then and there had notice, &c. *Very v. Brown*, 1800.

For an average loss, by the perils of the seas; special statement.

And the plaintiff says, that afterwards, and during the said voyage, to wit, on &c. on the high seas, to wit, at &c.. the said ship, and the tackle, apparel, and furniture thereof by the force of stormy weather, and the perils of the seas, became greatly damaged and shattered, and the starboard cable of the said ship, and the mizen sail thereof, were thereby carried away, and wholly lost to the plaintiff, and also, for the preservation of the said ship and cargo, the master of the said ship was thereby obliged, and did necessarily then and there cut away the larboard anchor of the said ship &c., whereby, in order to repair the damage done to the

said ship, and the tackle, apparel, and furniture thereof, as aforesaid, the said ship was then and there obliged to proceed, and did proceed, to the port of ———, to unload the said cargo, to wit, at &c. ; by means of which said several premises, and of the expenses occasioned thereby, the said plaintiff necessarily sustained an averaged loss, to wit, of ——— per cent. upon the said ship so insured as aforesaid ; and in consequence thereof, the said E then and there became liable to pay to the plaintiff, the sum of \$—, being his proportion of the said average loss, for and in respect of the said sum of &c., so by him insured as aforesaid : of all which the said E, afterwards, to wit, on &c., at &c., had notice, &c.

Statement of an adjustment.

To follow the statement of the loss, notice, and defendant's liability :— and thereupon the said E, and the plaintiff afterwards, viz. on &c., at &c., adjusted the said loss at the sum of \$— per cent. and the said E, in consideration of the premises, then and there, by a certain memorandum in writing, by him subscribed, undertook and faithfully promised the plaintiff, to pay him the said sum of \$—, so by him insured as aforesaid, on &c., then next following, &c.

On a policy of insurance on goods, lost by capture.

For that the plaintiff, on &c., at &c., caused to be made a certain policy of insurance, containing therein, that the plaintiff, as well in his own name, as for and in the name and names, of all and every other person or persons, to whom the same did, might, or should appertain, in part or in all, did make insurance &c. (*set out the policy in the past tense to the in testimonium.*) And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed, were warranted free from average, unless general, or the ship should be stranded ; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average, under 5 per cent. and all other goods, also the ship and freight were warranted free from average, under 5 per cent. unless general, or the ship should be stranded. And by a certain other memorandum thereunder written, it was declared, that the said insurance was on goods. As by the said policy of insurance, and memoranda, reference thereunto being had, will more fully and at large appear. *And the plaintiff avers, that the said policy of insurance and memoranda were*

so made by the plaintiff as aforesaid, as the agent of one E F and for his use and benefit, and that he, the said plaintiff, did receive the order for, and effect the said policy of insurance as such agent as aforesaid, to wit, at &c. aforesaid. Of all which premises the said E afterwards, to wit, on &c. at &c., had notice. And thereupon, afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the said E, had then and there paid to the said E, the sum of \$—, as a premium for the insurance of the sum of \$—, upon the said goods, in the said ship or vessel in the said voyage, in the said policy mentioned, and had then and there undertaken, and faithfully promised the said E, to perform and fulfil all things in the said policy of insurance contained, on the part of the insured to be performed and fulfilled, the said E, then and there undertook and promised the plaintiff, that he, the said E, would become an insurer to the plaintiff of the said sum of \$—, upon the said goods, in the said ship or vessel, in the said voyage in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned, on his part and behalf, as such insurer of the said sum of \$—, upon the said goods, in the said ship or vessel, in the said voyage, to wit, at &c. aforesaid. And the plaintiff further avers, that heretofore, viz. on &c., at &c., divers goods of great value, had been and were shipped and loaded, in and on board of the said ship or vessel, to be carried and conveyed therein, in the said voyage, viz. at &c. aforesaid; and *that the said E F* was then and there, and from thence continually afterwards, until and at the time of the loss hereafter mentioned, interested in the said goods, in the said policy of insurance and memoranda mentioned, and so shipped on board the said ship as aforesaid, to a large value and amount, to wit, to the value and amount of all the moneys by him ever insured or caused to be insured thereon, to wit, at &c., aforesaid. And the plaintiff further avers, that heretofore, to wit, on &c., the said ship or vessel, with the said goods on board thereof, departed and set sail from &c. aforesaid, on her said voyage towards &c. aforesaid, and afterwards, while the said ship or vessel was proceeding on her said voyage, and before her arrival at &c., the said ship or vessel, with the said goods on board thereof, as aforesaid, were, on the high seas, to wit, at &c., with force and arms, and in a hostile manner, captured, seized, and taken by certain subjects of

&c., and thereby the said goods, then and there became, and were wholly lost to the said E F, and never did arrive at &c. aforesaid; of all which said several premises, the said E afterwards, to wit, on &c., at &c., had notice, and was then and there requested by the plaintiff, to pay him the said sum of \$—, so by him insured as aforesaid, &c.

It is unnecessary to make profert of a policy of insurance. 1 Sid. 386.

It is not necessary that the particular description of the person, as stated in the policy, should be alleged in the declaration. Nor is it necessary to state more of the policy, than relates to the right of action. Whatever relates to the cargo merely, may be omitted where the action concerns only the ship, and *vice versa*. The captain's name may be omitted, as also the liberty to touch at ports, where the cause does not turn on it. If the policy is not a valued one, the valuation in the policy may be omitted. The peril, which occasioned the loss, is the only one necessary to be stated. Park, 189; Lawes on Assumpsit, 387.

The memorandum, at the bottom of a policy, need not be mentioned when the loss is total, nor where it is an average loss, unless it be a general one, or arise from stranding.

In general, the voyage, the commencement and termination of the risk, and the happening of the events, should be correctly set out. The acknowledgment of the receipt of payment, or an averment of payment, should be contained in the declaration. All warranties or stipulations, affecting the voyage, or the insurance, should also be stated.

Where the policy is on goods, it should be alleged, or should appear by necessary inference, that the goods on board the ship, were those insured. 2 B. & P. 153.

It should appear that the plaintiff was interested *at the time of the insurance*.

Proof of interest, in any share of the property insured, will support a general averment of interest, and the plaintiff will recover according to the amount of it. 3 Esp. 185; 2 B. & P. 240.

When the policy is a valued one, the averment usually is, that the plaintiff was interested in a large amount, *viz. the amount stated in the policy*; if an open one, *the amount of the sums insured*. The averment of interest should be made in *general* terms, because under it any insurable interest may be proved; but a special averment of interest can only be proved as alleged.

If the insurance is effected by an agent, named in the policy *as agent for the person interested*, the action should properly be brought in the name of the principal; but if it is effected by an agent, but it does not so appear on the policy, the action may be brought in the name of either, with an averment that it was made for the use of the person really interested.

The averment usually made, that the ship was in safety &c. *on the day of sailing*, is obviously unnecessary, in an action on a policy on ship, *lost or not lost*, because the policy equally attaches, whether it be true or not.

The declaration should contain averments, that the vessel sailed within or at the appointed time, with convoy &c., and should show that all representations or warranties were complied with, if to be performed *in futuro* i. e. after the signing of the policy.

The loss must be averred to have happened within the risks insured against, and should be stated with sufficient certainty, for the defendant

to know what he is to answer. It is usual to allege, that the goods were damaged &c. on the high seas, and by reason thereof became lost to the plaintiff at &c., within a proper county. If the plaintiff declares for a partial loss, he cannot give evidence of any loss beyond the amount alleged, but under a count for a total loss, he may give a partial one in evidence. 2 Bur. 904.

It is doubtful whether it be necessary to allege notice of the loss to the defendant; if a request is alleged, it will be sufficient.

It is usual to add a count for money had and received, to cover the premium, and one on an account stated, to authorize the introduction of evidence admitted between the parties, or an award &c., or an adjustment, which last however may be introduced on the count on the policy. See Doug. 301; Marsh. 636, 682; Peake's R. 227.

Statement of losses by the happening of the usual risks.

Loss by perils of the seas.

And the plaintiff avers, that the said ship or vessel, afterwards, viz. on &c., departed and set sail on the said voyage, with the said goods and merchandise on board her, as aforesaid, and while proceeding on her said voyage, with the said goods, and before her arrival at &c., aforesaid, viz. on &c., the said ship, with the said goods and merchandise on board her as aforesaid, was by and through the mere dangers of the seas, and the force and violence of the winds and waves, wrecked, foundered and sunk in the seas, whereby the said goods and merchandise became totally lost, to wit, at &c., on &c., of all which premises the said D there- afterwards, viz. on &c., at &c., had notice, &c.

Loss by capture by persons unknown.

And the plaintiff avers, that the said ship afterwards while proceeding on her voyage as aforesaid, viz. on &c., at &c., was, by force and violence, arrested and restrained, by certain people unknown to the plaintiff, on the coast of &c., whereby the said ship and freight became totally lost, &c.

Loss by capture of enemies.

And the plaintiff avers, that the said ship, while proceeding on her said voyage, and before her arrival at &c. aforesaid, viz. on &c., at &c., upon the high seas, with force and arms was attacked in a hostile manner, and taken and carried away a prize by certain enemies of the United States, viz. by certain subjects of &c., being then and still at enmity and open war with the United States of America, and thereby the same ship, with all the tackle, apparel, boat and other furniture thereof, became and was totally lost to

the plaintiff, viz. at &c., of all which said several premises the said D, &c.

Loss by fire.

And the plaintiff avers, that the said ship, while proceeding on her said voyage as aforesaid, and before her arrival at &c. aforesaid, viz. on &c. on the high seas, was burnt and consumed with and by fire, and the said goods and merchandise, then being and remaining in and on board the said ship, were thereby then and there wholly burnt and consumed by fire, and became wholly lost to the said owners thereof; of all which, &c.

Loss by barratry.

And the plaintiff further says, that afterwards, and before the arrival of the said ship with the said goods and merchandise, at &c. aforesaid, the master and mariners in and on board the said last mentioned ship, in a barratrous and fraudulent manner, without the knowledge and against the will of the plaintiff, took and carried away the said ship with the said goods and merchandise, so on board her as aforesaid, to places unknown to the plaintiff, and converted and disposed thereof to their own use; and the said plaintiff thereby wholly lost the said ship and the said goods and merchandise, so on board her as aforesaid, and the profits thereof; of all which said several premises the said E, &c.

Goods damaged by a leak.

And the plaintiff avers that the said ship afterwards, while proceeding on her said voyage, and before her arrival at &c., on the high seas, viz. on &c., at &c., was by and through the mere dangers of the seas, and the violence of the winds and waves, greatly damaged, and rendered leaky between the planks, and greatly filled with water, and the said goods and merchandise thereby, then and there in said voyage, were wetted, damaged, and wholly spoiled, and thereby rendered of no use or value to the proprietors thereof; &c.

Ship lost by being eaten by worms.

And the plaintiff avers, that the said ship afterwards, while proceeding on her voyage, and before her arrival at &c., upon the high seas, to wit, at &c., was greatly eaten, damaged, and destroyed by worms, and thereby, and by the force of stormy weather, and by the perils of the seas, the said ship was rendered of no use or value to the plain-

tiff, and was thereby wholly lost to him, to wit, at &c. aforesaid, of all which the said E, &c.

Loss in consequence of being fired upon by an enemy, &c.

And the plaintiff avers, that afterwards, and while the said ship with the said merchandise so laden on board her as aforesaid, was proceeding on her said voyage, to wit, on &c., on the high seas, viz. at &c., the said ship was attacked with force and arms, and fired upon by certain men of war, to the plaintiff unknown, and was then and there so greatly shattered and damaged in her hull, masts, and rigging, that by reason thereof the said ship, with all her tackle, apparel, ordnance, boat and furniture, together with the said merchandise, so laden on board of the said ship as aforesaid, were afterwards, viz. on &c., at &c., sunk in the sea and destroyed, and thereby became wholly lost to the plaintiff, viz. at &c.; of all which the said E, &c.

CASE. The plaintiffs freighted some corn at Stockton, for a voyage to Lisbon, and by the charter-party, covenanted to pay the master one half of the freight, on his signing bills of lading at Stockton. They accordingly paid him £120, in part of this half; but the ship being bilged, and disabled from proceeding in the voyage, they refused to pay him the remainder of the moiety of the freight. The master therefore brought an action on the charter-party, and recovered. The plaintiffs having insured the freight advanced, brought the following action.

Upon a Policy on money advanced for freight.

For that whereas the plaintiffs on &c., at &c., caused to be made a certain policy of insurance, containing therein, that the plaintiffs did cause themselves to be assured, lost or not lost, at and from S to L, upon any kinds of goods and merchandise; and also upon the body &c., of the good ship, called the Duke of York, whereof C was master &c., for that then present voyage &c., beginning the adventure upon the said goods and merchandise, from the lading thereof on board the said ship at S aforesaid, and from her arrival at S, and so should continue during her abode there, upon the said ship &c. and until the said ship &c. should arrive at L; upon the said ship &c., until she had moored at anchor twenty-four hours in good safety; and upon the goods and merchandise, until the same should be discharged there, and safely landed; and it should be lawful for the said ship &c. in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to that insurance; the said ship &c., goods and mer-

chandise &c., for so much as concerned the assured, by agreement between the assureds and assurer in that policy, were and should be valued at the sum insured, being money advanced on the freight. And the said plaintiffs aver, that the said C, mentioned in the said policy of insurance, before the making thereof, and from thence until and at the time of the loss and misfortune, hereinafter mentioned, was master of the said ship, called the Duke of York, in the said policy of insurance mentioned, and the said plaintiffs &c. before the making of the said policy of insurance, viz. on &c., at &c., had hired to freight the said ship of the said C &c., and the said C had let to freight the said ship for carrying a cargo of goods from S aforesaid to L aforesaid, to be thereafter paid to the said C for the same, and which said cargo was accordingly, at &c., on &c., put on board the said ship, and by the terms of that letting and hiring, one half of the said freight was to be paid to the said C on his signing the bills of lading for the said cargo, at S, which said bills of lading the said C then and there signed, and the half part of the said freight amounted to £—, and the plaintiff then and there paid the same to the said C, and the said half of the said freight so paid, and to be paid by the plaintiffs, was the interest of the plaintiffs, which was intended by them to be insured by the said policy of insurance, and which was afterwards insured thereby accordingly; of which said policy of insurance, the said D, on &c., at &c. had notice, and thereupon then and there, in consideration that the plaintiffs, at the request of the said D, had then and there paid to the said D, the sum of &c. as a premium for the insurance of £100 &c., upon the premises, contained in the said policy of insurance, as to the said half of the said freight and had then and there undertaken and promised the said D, to perform all and singular the premises in the said policy of insurance contained, on the behalf of the insured to be performed, the said D undertook and faithfully promised the plaintiff, that the said D would become an insurer for the sum of &c., upon the premises mentioned in the said policy of insurance, as to the said half of the said freight, and that he would perform all and singular the premises, in the said policy of insurance contained, on his part to be performed, as to the said sum of &c., and then and there subscribed the said policy of insurance, as such insurer for the said sum of &c. And the plaintiffs aver, that the said ship, on &c., at &c., was in good safety at S aforesaid; and

thereafterwards, on the same day, divers goods &c. to a large amount, viz. to the value of &c. were laden on board the said ship, to be carried from said S to said L, in her said voyage, and on freight as aforesaid; and the said goods &c. remained laden on board the said ship from thence, until and at the happening of the misfortune hereafter mentioned; and the said sum of &c., part of the said freight, was so paid, and agreed to be paid, by way of advance as aforesaid to the said C. And the plaintiffs further say, that the said ship with the said goods &c. so laden and remaining on board her as aforesaid, viz. on &c., departed from S aforesaid, on her said voyage towards L aforesaid; but that the said ship, with all her tackle &c., and goods &c., so laden and being on board her as aforesaid, or any part thereof, did never arrive at the said port of L, or finish the said voyage, but, on the contrary thereof, the said ship &c. with the said goods &c., whilst she was so proceeding on her said voyage, after her said departure from said S, and upon her arrival at the said port of L, viz. on &c., on the high seas, viz. at &c., was, by the force and violence of the winds and waves, and stormy and tempestuous weather, and the mere dangers and perils of the seas, stranded and broken to pieces, and rendered incapable of proceeding on her said voyage, and the said goods were thereby damaged and spoiled, so that they could not go the said voyage, to the end thereof; whereby the whole money, advanced and agreed to be advanced on the said freight, was wholly lost to the plaintiffs; of all which said premises the said D, on &c., at &c., had notice, and was then and there required by the plaintiffs to pay the sum of &c., parcel of the said sum of &c., so by him assured as aforesaid, and which the said D ought to have paid to the plaintiffs according to his promise &c. *Abridged from English Manuscript of J. Yates.* See 4 Dall. 459; 2 Johns. 346.

On a policy on life.

For that whereas the plaintiff, on &c., at &c., caused to be made a certain policy of insurance, containing therein, that in consideration of &c. per cent. the receipt of which, the several persons whose names were thereto subscribed, thereby acknowledged, and according to that rate, for every greater or less sum received of the plaintiff, they, whose names are thereto subscribed, did for themselves, &c. (*follow the language of the policy,*) promise &c. that

they &c. would pay &c. unto the plaintiff, his &c. the full sum and sums of money, which they had thereunto respectively subscribed, on the following conditions, (that is to say) in case E F of &c. should die, or decease out of his natural life, by any ways or means whatsoever, suicide and the hands of justice excepted, at any time between the — day of &c., and the — day of &c., both days included ; and by the said policy of insurance, the interest of the plaintiff, in the life of the said E F was valued at the sum insured ; and by a certain memorandum thereunder written, the said E F was warranted in health ; as by the said policy of insurance, and memorandum more fully appears ; of which said policy the said D, on &c., at &c., had notice, and thereupon then and there, in consideration that the plaintiff, at the request of the said D, had then and there paid to the said D, the sum of \$—, as a premium for the insurance of the sum of \$—, upon the premises mentioned in the said policy of insurance, and had then and there promised the said D, to perform all things, in the said policy of insurance contained, on the part of the insured to be performed, he, the said D, undertook and then and there faithfully promised the plaintiff, that he, the said D, would become an insurer to the plaintiff of the said sum of \$—, upon the premises aforesaid, and would perform all things, in the said policy of insurance contained, on his part, as such insurer, to be performed ; and the said D then and there became an insurer to the plaintiff, and then and there subscribed the said policy of insurance, as such insurer of the said sum of \$—, as aforesaid ; and the plaintiff avers, that at the time of making the said policy of insurance, and of the promise of the said D, the said E F was in health, and that the plaintiff was then, and from thence until the time of the death of the said E F, interested in the life of the said E F, to the amount of all the moneys by him ever insured thereon, to wit, at &c. aforesaid ; and the plaintiff further avers, that after the making of the said policy of insurance, and between the said — day of &c., and the said — day of &c., in the said policy of insurance mentioned, the said E F died and deceased out of his natural life, by other means than by suicide, or by the hands of justice ; of all which the said D on &c., at &c., had notice ; and was then and there requested by the plaintiff, to pay him the said sum of \$—, so by him assured as

aforesaid, but the said D then and there wholly refused so to do.

NOTE. For a concise view of the law on this subject, See *Law Summary*, p. 258.

9. *For General Average.*

For that whereas the plaintiff, before and at the time of the happening of the losses hereinafter mentioned, was owner of a certain vessel called the *Star*, and of her tackle, anchors, masts, boats and appurtenances, the same being of great value, to wit, of the value of \$—, and which said vessel was then proceeding on a certain voyage, to wit, from &c. towards &c., with certain goods of the said D of great value, viz. of the value of \$—, on board thereof, to be carried and conveyed therein on freight during the said voyage, to wit, at &c.; and whereas, while the said vessel was proceeding on her said voyage with the said goods on board thereof, viz. on &c., at &c., by the violence of tempestuous weather, one of the anchors belonging to the said vessel, and then and there being the property of the plaintiff, and of great value, to wit, of the value of \$—, was forced overboard out of the said vessel, and became entangled in the rigging thereof; and thereupon, in order to preserve the said vessel, and the goods on board thereof, it became necessary to cut away the jibs, &c. and other parts of the rigging belonging to the said vessel, and the property of the plaintiff, of great value, to wit, of the value of \$—, and the same were then and there accordingly cut away, and thereby then and there became wholly lost to the plaintiff; and the plaintiff further says, that by means of the said damage and loss, occasioned as aforesaid, the said vessel was so greatly damaged, that it became necessary for the preservation of the said vessel and goods, to put back again to said M, and there to repair the said damages; and the said vessel, with the said goods on board thereof, did thereupon then and there put back again to said M, and the said damage was then and there repaired, and the necessary expenses, incurred by the plaintiff in the premises, amounted to the sum of \$—; and the plaintiff further says, that, whilst the said vessel was so repairing as aforesaid, to wit, on &c., at &c., the plaintiff was obliged to pay the wages and maintenance of the crew on board the said vessel, amounting in the whole to \$—; and the said goods were then and

there preserved, and arrived safely into the possession of the said D; of all which the said D, on &c., at &c., had notice; and by reason of the premises, the said D being the owner of the said goods, so preserved as aforesaid, became liable to contribute to the said losses, damages, and expenses in a general average, and thereupon, in consideration thereof, the said D afterwards, viz. on &c., at &c., promised the plaintiff to pay him so much money as he, the said D, as owner of the said goods, was liable to contribute to the losses and expenses aforesaid, in a general average, upon request; and the plaintiff avers, that the said D, as owner as aforesaid, was liable to contribute to the losses and expenses aforesaid, in a general average, a large sum of money, viz. the sum of \$—; whereof the said D, on &c., at &c. had notice; yet, though often requested, &c.

NOTE. In order to entitle one to contribution, the sacrifice must be necessary to save the vessel, &c. and must be made with that view, and that consequence must follow.

Neither sailors' wages, nor the ship's provisions, nor the wearing apparel, nor personal ornaments of those on board, contribute. But jewels, &c. when merely merchandise, as also gold and silver, contribute; See Park on Insurance, 128; 2 Pick. 1.

The value of property sacrificed, is that which other similar merchandise saved, was sold for, deducting freight and charges. Park, 127.

See Law Summary, p. 321, where the subject of general average is examined.

10. *On Collateral undertakings.*

On an undertaking to pay the debt of another, in consideration that the plaintiff would forbear to sue.

For that whereas one H, on &c., at &c., was indebted to the plaintiff, in the sum of \$—, with interest therefor, according to the note of the said H, under his hand, given to the plaintiff long before, viz. on &c., and being so indebted, the plaintiff was about to sue the said H, for the recovery of the said sum, with the interest thereon due; and the said E, on &c., at &c., in consideration that the plaintiff would then and there, at the special request of the said E, forbear to sue the said H, for the purpose and cause aforesaid, promised the plaintiff to pay him the said sum of money, and the interest due thereon, owing &c. as aforesaid, by the said H to the plaintiff; and the plaintiff avers, that confiding in the said promise of the said E, he hath hitherto forborne to sue the said H, and hath never commenced an action against the said H, in this behalf; and, although a

reasonable time for the payment of the said sum of money and interest, so owing by the said H, hath long since elapsed, viz. on &c., yet the said E, though on &c., at &c., requested, hath never paid the same, but wholly neglects and refuses so to do; and the said sum of money and interest, so owing from the said H as aforesaid, is still unpaid and in arrears to the plaintiff. See 3 *Went.* 436.

On an undertaking to pay the debt of another, in consideration of plaintiff's forbearing to sue him.

For that the said H and the plaintiff, on &c., at &c., had discoursed concerning a note of hand, given before that time for value received by one E, son of the said H, to the plaintiff, dated at &c. for \$100, and interest therefor till paid, and for which the said H, before that time promised to be bound with his said son, to the plaintiff; which said sum, with the interest, was on &c. wholly unpaid; and the plaintiff was then determined [about] to commence a suit to the then next Court of Common Pleas, to be holden in said county of G, against the said E, to recover the principal sum and interest of the said note. And the said H, on &c., at &c., in consideration that the plaintiff would forbear suing said E, and also that the plaintiff would take wood, in part payment of said principal and interest, by a note and memorandum, promised the plaintiff to pay him the same, and interest. And the plaintiff in fact says, that he, trusting to the said promise of said H, forbore, and hath ever since forborne to bring any suit against said E, and that he hath always been ready and willing to take wood of the said H, in payment of said note and interest, and that he, the plaintiff, hath received no part of the said note, but that the same is still unpaid, and that the said H had paid no part of said note, though requested [and though a reasonable time for that purpose hath elapsed] but wholly refuses so to do.

THACHER.

NOTE. In cases of collateral undertakings under the statute of frauds, the plaintiff should declare specially; but it is not necessary to state that the promise or agreement was in writing.

Where goods were furnished to a third person, in consequence of a letter from the defendant, stating that he would answer for the payment and the plaintiff brought indebitatus assumpsit for goods sold to the defendant, and at his request delivered to such third person, the plaintiff was nonsuited. *Mines v. Sculthorp*, 2 Camp. 215.

A promise to pay the debt of another, in writing, and signed by the party intending to be bound, is a sufficient compliance with the statute of frauds, without any recital in the writing of the consideration, upon which

the promise is founded. *Packard v. Richardson et al.*, 17 Mass. R. 122. This decision in Massachusetts overrules the decision of *Wain v. Warlters*, 5 East, 16. But in New York, in *Sears et al. v. Brink et al.*, 3 Johns. 211, it is decided that the consideration, as well as the promise, must be in writing, and the case of *Wain v. Warlters* is recognised as law. See Law Summary, p. 73, where a concise practical view is given of the operation of the statute of frauds, on collateral undertakings, guaranties, &c.

11. On Contracts of Indemnity.

For not indemnifying plaintiff, who was one of defendant's surety in a bond; in consequence whereof plaintiff paid the same to prevent a suit.

For that whereas the said plaintiff, at &c., on &c., at the request of the said D, and for his, the said D's proper debt, together with the said D and one A A, by their bond of that date, duly executed, bound themselves jointly and severally to one B B, his heirs, executors, administrators, or assigns, in the full and just sum of &c., with lawful interest, on or before &c., he, the said D, in consideration thereof, then and there promised the said plaintiff, to pay the said B B the sum of &c., with interest, on or before &c., last above mentioned, and thereby save him, the said plaintiff, harmless and indemnified, against the bond aforesaid. Now the said plaintiff says, that although the said — day of &c. last above mentioned, hath long since past, yet he, the said D, hath never paid the said B B the said sum of &c., nor the interest thereof, nor hath he in any manner satisfied him or his heirs &c. therefor. And the said plaintiff further saith, that after the said — day of &c., to wit, at &c., on the — day of &c., the said bond being then unsatisfied, he, the said plaintiff, to prevent his goods and estate from being attached, and his body from being arrested, was compelled to pay and satisfy the said bond, and to expend divers sums of money in and about the premises. And so the said plaintiff saith, that the said D, though often requested, hath not saved him, the said plaintiff, harmless and indemnified from the bond aforesaid, but hath refused and still doth refuse so to do.

T. PARSONS.

For not indemnifying plaintiff who was surety for defendant in a bond; in consequence of which plaintiff was sued, &c.

For that the said D, on &c., at &c., in consideration that the said A, at the request of the said D, would become bound with him, the said D, and E F, to one G H, by a bond, in the penal sum of \$—, conditioned for the payment of \$—, with interest for the same, to the said G, his execu-

tors, &c., by the — day &c. promised the plaintiff to save him harmless from all demands, suits, and troubles, that might happen to him by means of his being so bound as aforesaid; and the plaintiff in truth saith, that giving credit to the said C's promises as aforesaid, he did then and there, at the request of said D, become bound with him and the said E unto the said G, by such a bond as aforesaid, conditioned as aforesaid; yet the said A, not minding his promise aforesaid, never paid the said \$—, nor the said interest for it, by the said — day, or at any time since, nor saved the plaintiff harmless, concerning the premises; but at our C. P. the plaintiff was impleaded upon the bond aforesaid, by J K, administrator of the aforesaid G, who before that time, died intestate, to wit, at &c., which said J K so far prosecuted the action against the plaintiff, upon the bond aforesaid, that he recovered judgment against the plaintiff upon the said bond, for \$—, and \$— costs of suit, and has since sued out a writ of execution thereupon, against the plaintiff, whereby the plaintiff has been compelled to pay, not only those sums, but divers other sums of money, and has been put to great trouble and expense by means of the suit aforesaid; to the damage, &c.

For not indemnifying sureties in a probate bond.

For that the said B and C, (plfs.) on &c., at &c., at the special instance and request of the said D, as well as for the sole debt of him the said D, by a certain writing obligatory of that date in &c. court to be produced, became bound with the said D, jointly and severally unto E E, Esq., Judge of the probate of Wills, and granting administration within the county of &c., in the sum of \$—, to be paid unto the said E and his successors in his said office, or assigns, on demand; in consideration thereof the said D then and there promised the plaintiffs, that he, the said D, would at all times forever thereafter, well and fully indemnify and save harmless, them, the said B and C, from and against all damages, costs and charges, which might happen, arise, or accrue to them, from or by reason of their becoming so bound as aforesaid. Now the plaintiffs in fact say, that the said D, though requested, has never indemnified and saved them harmless as aforesaid, but the same obligation now remains in full force and virtue against them, and the same sum of \$— is forfeited and become due; and the said B and C are now exposed to an action by law, to be brought by said

E, Esq., upon the same obligation, to have and recover the same against them; and the said D still refuseth to indemnify and save the plaintiffs harmless, according to his promise aforesaid, &c.

J. SEWALL.

NOTE. See 3 Wil. 13, 262; 3 Bac. 707. Here the surety does not state that he paid, but only that he is liable to be sued. See also 2 Ins. Cl. 133; Cro. Eliz. 264, 369; 4 Ins. Cl. 454; 8 Wood's Con. 606; 1 Cro. 97, 156. (MSS.)

For not indemnifying surety in a joint note.

For that the said D, on &c., at &c., in consideration that the plaintiff had, at the special instance and request of the said D, and for the said D's proper debt, together with the said D, by their note in writing, under their hands of that date, then and there promised to pay one C \$—, in six months from the date of said note, with lawful interest until paid; he, the said D, then and there promised the plaintiff to pay the said C the sum of \$—, in six months from the date of the said note, and thereby save the plaintiff harmless and indemnified, from the promissory note aforesaid. Now the plaintiff in fact says, that the said D, though the said six months are past, hath never paid the said C the said sum of \$—, or any part thereof, or the interest thereof, or in any wise hitherto satisfied him therefor; and the said C, afterwards, to wit, at our C. C. P., held, &c., impleaded the plaintiff upon said promissory note, and the said plea prosecuted unto final judgment, and the said C thereupon, thereafterwards, on &c., sued out our writ of execution in the form of law prescribed, and then and there delivered the same to T S, one of our deputy sheriffs in and for our county of &c., by reason of all which the plaintiff hath been held and compelled not only to pay to the said T S the sum of \$—, to save the plaintiff's body from being arrested by the said T S, by virtue of our said writ of execution, but also to expend and lay out divers other sums of money, in and about the defence of the said suit. And the plaintiff saith, that the said D, though often requested, hath not saved him harmless, and indemnified him from the promissory note aforesaid; but &c.

F. DANA.

For not indemnifying surety in a joint note against the survivor of joint promisors.

For that whereas the plaintiff, at the special request of the said D and one B, who has since deceased, and for the

proper debt of the said D and B, on &c., at &c., by his note under his hand of that date, promised one C to pay him, on demand, the sum of \$—, for value received, the said B and D, in consideration thereof, then and there promised the plaintiff to indemnify and save him harmless therefrom, and to pay to said C the said sum of \$—, accordingly ; yet the said B and D, or either of them, during the life of said B, never paid the said sum, nor indemnified and saved harmless the plaintiff from the note aforesaid, but at our S. J. C., held &c., suffered judgment to be recovered against the plaintiff for \$—, damages, in an action commenced against him by the said C, upon the note aforesaid, and \$—, costs of court ; and the said B hath since deceased, and thereupon an action hath accrued to the plaintiff against the said D for the damages he has suffered thereby ; yet the said D since the decease of the said B, though often requested, hath never paid him for the same, but &c.

For not indemnifying a surety in a bond given for a sum of money, part of which was due from the plaintiff himself.

For, that whereas, on &c., at &c., the plaintiff, at the special request of the said N and E, became jointly and severally bound with the said N and E, unto one J S, by a bond of that date, in the penal sum of \$1000, with condition to be void upon the payment of \$500, with lawful interest therefor, by the — day of &c., next then ensuing, whereof \$400 of the said \$500 was the proper debt of the said N and E, and the remaining \$100 thereof was the proper debt of the said plaintiff ; the said N and E, in consideration thereof, and in consideration that the plaintiff then and there promised them, to indemnify them against the said J. S. concerning the said \$100, then and there promised the plaintiff to indemnify him against the said J S concerning the said \$400. Now the plaintiff in fact saith, that he hath paid the said J S the said \$100, with the interest for it, and always indemnified the said N and E touching the same ; yet the same N and E, not minding their promise aforesaid, never paid the said J S the said \$400, or the interest for it, nor indemnified the plaintiff touching the same ; and because the same was not paid, the said J S impleaded the plaintiff, with the said N and E, upon the bond aforesaid, in our Court of [Common Pleas, held at &c., on &c., &c.] and recovered judgment in our said court thereupon, against the plaintiff and the said N and E, for \$400, for debt, and \$30

costs of suit, and hath since sued out three writs of execution thereon, against the plaintiff and the said D and E; whereupon the plaintiff hath been finally compelled to pay the sum of \$—, and been put to great trouble in procuring the same. [See 2 *Ins. Cler.* 129, &c.] R. DANA.

By Administrator v. Executor, for not indemnifying plaintiff's intestate, nor plaintiff, in said capacity, from a bond, in which the intestate was surety for defendant's testator.

For that whereas the said A, at &c., on &c., being then in full life, in consideration that the said S [plaintiff's intestate] then living, at the request of the said A, would become bound with him and one J C to J D, late of &c., by a bond, in the penal sum of \$—, conditioned for the payment of \$— to the said J D, his executors, &c., on or before &c., promised the said S, then living, that he would pay the aforesaid sum and the interest thereof, according to the condition of said bond, and that he would save him, his executors, &c., harmless from all damages, suits, and troubles that might or should happen to him or them, by reason of his being so bound as aforesaid. And the said plaintiff avers, that the said S, in his lifetime, giving credit to the said A's promises as aforesaid, did then and there at the request of the said A, become bound with him and the said J C to the said J D, in such bond as aforesaid, conditioned as aforesaid, being for the proper debt of him, the said A; yet he, the said A, not regarding his promise aforesaid, never paid the said \$— and the interest thereof, by said — day of &c., nor at any time since, nor saved said S, in his lifetime, nor the said plaintiff, his administrator, since the said S's decease, harmless concerning the premises; nor hath the said D, executor as aforesaid, done the same, since the decease of said A; but the said plaintiff, as administrator &c., as aforesaid, afterwards, and after the decease of the said S, to wit, on &c., at &c., to prevent the goods and estate in the said plaintiff's hands, and under his administration, to be taken in execution, to satisfy and pay the said sum of \$—, and \$— interest, making in the whole \$—, and his being put to further and great costs and charges, in his said capacity, has been compelled to pay the aforesaid sum to J D of &c., executor &c. of the first named J D, who is now and was then deceased; and has, in his said capacity, sustained and been put to other great damages

and charges, by means of the premises ; all which is to the damage, &c.

WM. PRESCOTT.

For not paying half of a joint and several note, given by plaintiff and defendant's intestate, for a debt jointly due by them and paid wholly by plaintiff.

For that the said plaintiff and said I, [intestate] at &c., on &c., being jointly indebted to one C in the sum of \$—, to secure the payment of said sum, gave a promissory note to said C, of that date ; by which they promised, jointly and severally, to pay said C that sum in — months from that date, with interest therefor, until paid. And afterwards, on &c., at &c., the said note being due and unpaid, the plaintiff was requested by the said C to pay her the whole of the said sum, and the interest until that time, which the said plaintiff then and there did, the interest and principal amounting to \$—, of which said I thereafterwards, on the same day, had notice, and thereby became liable to, and in consideration of the premises, then and there promised the plaintiff to pay him, one half of the principal and interest, to wit, the sum of \$— on demand ; yet the said I, though often requested, to wit, on &c., at &c., never paid the same in his lifetime, nor hath the said E paid the same though alike requested, since his death, &c. T. PARSONS.

For not indemnifying plaintiff who was defendant's bail.

For that the said E, on &c., at &c., being attached by our writ, at the suit of one F, the plaintiffs, at the request of the said E, became bound unto T S, sheriff of our said county of &c., in the sum of \$—, conditioned for the said E's appearance, &c., to answer to said suit ; in consideration whereof the said E, did then and there promise to give the plaintiff sufficient security, to save harmless, and indemnify the plaintiff from all trouble and damages he might thereby be liable to ; yet the said E, not regarding his promise, but designing to expose the plaintiff to the event of said suit, hath not given him such security to indemnify him, though often requested, but neglects it. READ.

For not indemnifying plaintiff who was defendant's bail ; stating defendant's appeal on the former suit ; the return of non est inventus, on execution ; and the recovery on scire facias against plaintiff.

For that whereas I F of &c., did, on &c., sue out of the clerk's office of our C. C. P. in and for our said county of &c., our writ of attachment, in due form of law, against the

said E, directed to the sheriff of our county of &c. or his deputy, returnable into our said court, to be held at &c., on &c.; and the said I F thereon &c. delivered our writ of attachment to one S T, then and ever since being a deputy sheriff, in and for our said county of &c., to be by him duly served; and thereupon, by force thereof, the said S T did thereafterwards, on the same day, for want of goods or estate of the said E take and arrest the body of the said E, and him kept and held imprisoned, as he lawfully might do; and the said E, being so held and imprisoned, the plaintiff, then and there, at the special instance and request of the said E, for his delivery from the arrest, custody and imprisonment aforesaid, and that he might go at large, became bail upon our said original writ, not only for the said E's appearance at our said court, into which the same writ was returnable as aforesaid, but for his abiding the final judgment, which should be given thereon, and not avoiding the same; and the said E thereafterwards, on the same day, in consideration thereof, promised the plaintiff to appear and answer the said I F, according to the tenor of our said writ, and abide the final judgment thereon, and not avoid the same, and thereby save and keep the plaintiff harmless and indemnified from all costs, charges, or damage, by reason of his having become bail for the said E, as abovementioned; yet the said E, not regarding his promise aforesaid, but contriving and fraudulently intending to defraud, deceive, and injure the plaintiff in that behalf, did not appear in our said court, in which our said writ was returnable as aforesaid, to answer to the said I F according to the tenor thereof, but made default; whereupon the said I F, by the consideration of our justices of our said court, held at &c. aforesaid, and within and for our said county of &c., on &c., recovered judgment against E for the sum of \$— damages, and \$— costs of the same suit, as by the record thereof in our said court remaining, more fully appears; from which judgment the said E appealed unto our S. J. C. held at &c., on &c., and entered into cognizance with sureties, as the law directs, to prosecute his said appeal to effect, but failed so to do; whereupon the said I F duly entered and filed his complaint in our said court, praying affirmation of our said judgment, with additional damages and costs, and thereupon by the consideration of our said justices of our said S. J. C. recovered judgment against the said E, for the sum of \$—, damages, and \$—, costs of the

same suit, as by the record thereof in our said court remaining appears; and on &c. duly sued our writ of execution thereupon, in the form of law prescribed, directed, &c., returnable &c.; and the said I F there, on &c. delivered our said writ of execution to one T K, then and ever since a deputy sheriff of our said county of &c., who duly returned upon our said writ of execution, into our said court, that he had made diligent search for the said E, but could not find him, or estate of his, in his precinct, whereon to levy said writ, and thereupon he returned it, in no part satisfied; and thereupon the said I F on &c. duly sued out our writ of *scire facias*, in the form by law prescribed, against the plaintiff, as bail upon our said original writ as aforesaid, which said writ of *scire facias* was returnable and duly returned into our said S. J. C. held at &c., on &c., within and for &c.; and the said I F thereupon, by the consideration &c., then and there recovered judgment against the plaintiff for the sum of \$—, and \$—, costs of the same suit, as by the record &c. [the plaintiff being unable to show any cause why the said I F ought not to have judgment thereupon against him,] and on &c. duly sued out our writ of execution thereon, against the plaintiff, in the form by law prescribed, directed &c., returnable &c. into our said S. J. C.; and the said I F thereon &c., delivered our said writ of execution to one H M, then and ever since a deputy sheriff of said county, to be by him duly served and executed; by reason of all which, the plaintiff hath been compelled, not only to pay the said H M the said several sums of \$—, together with \$—, more for our said writ of execution, and \$—, for the said H M's fees thereon, amounting in the whole to \$—, to save the plaintiff's body from being arrested and imprisoned by the said H M by virtue of our said writ of execution, but also to expend and lay out divers sums of money, in and about the defence of the same suit. And so the plaintiff saith, that the said E hath not saved him harmless and indemnified from the loss, charge, and damage, he hath sustained, on account of his becoming bail for the said E, as abovementioned, though often requested, but hath altogether refused, and still unjustly neglects and refuses to do it, &c. *Stearns v. Littlehale.*

F. DANA.

NOTE. Bail may recover against the principal debtor, all expenses they are put to, arising from being bail; but they cannot recover the costs, they have been obliged to pay, from improperly resisting the action against themselves, as bail. 5 Esp. 171.

For not indemnifying bail. By administratrix of surety in a bail bond.

For that whereas, on &c., at &c., the said A by force of our writ of *capias*, or attachment, dated &c., and returnable into our court, held &c., was arrested by H I, then, to wit, on &c., being a deputy sheriff of our said county, at the suit of one K L, to answer to the said K, in our said court to be holden at &c., on &c., in a plea of trespass, for assaulting, beating, and wounding the said K, to his damage, as he said, the sum of \$—; and the said A, being in the custody of the said deputy sheriff, by force of the writ aforesaid, on the said — day of &c. for regaining his liberty, requested the said B, to bail him the said A to J F Esq. sheriff &c. in the penal sum of \$—, conditioned for the said A's appearance at our said court, at &c., on &c., aforesaid, and for his abiding the judgment that should be given upon the writ aforesaid, and promised the said B to indemnify him, his executors and administrators, from all costs and damages, that might happen to him or them, by means of his being bound as aforesaid; whereupon the said B, relying upon the said A's promise aforesaid, on &c., there became bound with the said A, at his request, to the said J F, in such a bond as aforesaid, conditioned as aforesaid; and afterwards such proceedings were had upon the writ and action aforesaid, that the said K L, in our said S. J. C., held &c., recovered judgment of the same court, against the said A, in the action aforesaid, for \$—, damages, and \$—, costs; yet the said A, not minding his promise aforesaid, never satisfied the said judgment, nor paid either of the sums aforesaid, but suffered our writ of execution to be sued out on the judgment aforesaid, and avoided and concealed himself and his estate, so that neither of them could be found; and so the same execution was returned, in no wise satisfied; by reason whereof, and by means of the aforesaid B, being bound aforesaid, the said plaintiff, administratrix aforesaid, has, by due course of law, been compelled to pay the said K L the sum of \$—, besides being put to great trouble and expense of divers other sums of money, on that behalf; to the great damage, &c.

R. DANA.

12. *For not redelivering property, &c.*

For not suffering plaintiff to redeem goods pawned; against pawnbroker.

1st COUNT. — *For not taking due care, but suffering the goods to be burnt.*

For that, on &c., at &c., the said E, being a pawnbroker,

and carrying on and conducting the business of a pawnbroker, then and there, in consideration that the plaintiff, at the special request of the said E, had pawned and delivered to the said E, as and by way of pledges for certain sums of money, before then advanced by him to the plaintiff, *amounting in the whole to a large sum of money, to wit, \$—*, certain goods and chattels, to wit, &c., of the plaintiff, of a large value, to wit, &c. promised the plaintiff to take due and proper care of the said goods and chattels, and *of each and every of them*, until the same should be redeemed by the plaintiff; and the plaintiff in fact says, that, although the said E had received the said several goods and chattels of the plaintiff, on that occasion, and for the purpose aforesaid; yet the said E did not take proper and due care, of the said goods and chattels of the plaintiff, but, on the contrary thereof, the said E, after the pawning and delivery of said goods and chattels to him as aforesaid, to wit, on &c., at &c., took so little and bad care of, and so negligently kept the said goods and chattels, that they *whilst they were so in possession of said E, for the purpose aforesaid, were burnt, damaged, destroyed and consumed by fire*, and wholly and entirely lost to the plaintiff.

2d COUNT. — *For not redelivering the goods, the redemption money being tendered.*

And for that the said N, so being a pawnbroker, on &c., at &c., in consideration that the plaintiff had, before then, pawned and delivered to the said N, at his special request, as and by way of pledges for certain sums of money, before then advanced by him to the plaintiff, amounting, in the whole, to a large sum, to wit, &c., certain other goods and chattels, to wit, &c., promised the plaintiff to take due and proper care of the last mentioned goods and chattels, until redemption thereof by the plaintiff, and to permit the plaintiff to redeem the same, or any part thereof, upon request, and, on such redemption redeliver the same, or such part thereof to the plaintiff; and the plaintiff further says, that the said N had and received the last mentioned goods and chattels of the plaintiff, on the occasion, and for the purpose last aforesaid, to wit, at &c.; and, although the plaintiff afterwards, and before the redelivery of the last mentioned goods and chattels, to wit, on &c., at &c., was ready and willing, and then and there tendered and offered to redeem the last mentioned goods and chattels,

and to pay all and every sum and sums of money due and owing the said N, upon and for redemption of the same, and then and there requested the said N to redeliver the same to him, and to suffer and permit him to redeem the same; yet the said N did not, nor would, when so requested as aforesaid, suffer or permit, nor hath he yet suffered or permitted the plaintiff to redeem the same, or any part thereof, but hindered and prevented him from so doing; and then and there refused to accept the money, so tendered and offered as aforesaid, for the redemption thereof, nor did he then and there redeliver, nor hath yet redelivered the same or any part thereof to the plaintiff, but wholly refused, and afterwards converted the same to his own use. 2 *Went.* 281. V. LAWES.

Add a count like the first, omitting the parts in italics, and a count for goods sold and delivered, and the money counts.

For not returning a note delivered into the hands of deft. for safety.

1st COUNT. — *On a promise to return the note, or the value thereof.*

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, had then and there delivered to and deposited in the hands of the said E, a certain promissory note for \$20, drawn by one A B in favor of one P, and by him indorsed to the plaintiff, the said E promised the plaintiff, that he, the said E, would return the said note, *or the value thereof*, to the plaintiff, upon request; and although the plaintiff, afterwards, to wit, on &c., requested the said E to return the said note *or the value thereof*, to the plaintiff, according to his promise aforesaid; yet the said E did not, when so requested, return, nor hath yet returned the said note amounting to a large sum of money, to wit, \$20, *or the value thereof*, but wholly refused and still refuses so to do.

2d COUNT. — *On a promise to take due and proper care, &c.*

And for that on &c., at &c., in consideration that the plaintiff, at the like request of the said E, had then and there delivered to, and deposited in the hands of the said E, to be thereafter accounted for by the said E, a certain other promissory note, for \$20, drawn by one A B in favor of C, and by him indorsed to the plaintiff, the said E promised the plaintiff, that he, the said E, would take due and proper care of the last mentioned note; yet the said E, did not take due and proper care of the last mentioned note, but on the con-

trary thereof, after the bailment and delivery thereof, as aforesaid, took so little and such bad care thereof, and behaved so negligently in the premises, that the said note being of a large value, to wit, &c., became and was and still is, wholly lost to the plaintiff, to wit, at &c. 2 *Went.* 282.

V. LAWES.

Add a third count, like first, omitting the parts in italics and the common counts.

For not redelivering a bill of exchange, left for acceptance.

1st COUNT.— *On promise to deliver on request.*

For that whereas the plaintiffs, on &c., at &c., were possessed of a certain bill of exchange in writing, as their own, of the value of \$50, purporting to be drawn by one A B upon the said E, for the sum of \$50, to be paid to one P, or his order, which said bill was then and there indorsed by the said P; and, being so possessed thereof, the said E then and there, in consideration that the plaintiffs, at the special request of the said E, would deliver the said bill to the said E, and leave the same with the said E, promised the plaintiffs to deliver the same to them upon request, and the plaintiffs, relying on the said promise of the said E, did then and there deliver the said bill to, and leave the said bill with the said E, at his request;

2d COUNT. — *On promise to return the next day.*

And whereas &c. *as before, only stating the promise to return the bill the next day.*

Yet the said E did not deliver the said bills, or either of them, to the plaintiffs or either of them, the next day after the delivery thereof to the said E, or at any time since, though on &c., at &c. requested, but wholly refused, and still refuses so to do. 2 *Went.* 283.

For not redelivering butter deposited with defendant, a wharfinger.

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, the said E then and there being a wharfinger, had delivered to the said E divers goods and merchandises, to wit, sixty firkins of butter of the plaintiff, of great value, to wit, &c., to be by the said E safely and securely kept and preserved, at a certain wharf of the said E, for a certain reasonable reward, the said E promised the plaintiff safely and securely to keep and preserve the said goods and merchandises, and to deliver the same

to the plaintiff upon request; and although the said E, afterwards, to wit, on &c., at &c., did deliver divers, to wit, ten firkins of butter, parcel of the said sixty firkins to the plaintiff; yet the said E hath not delivered the residue thereof, although, on &c., at &c., and often since requested, but refused and still refuses so to do. 2 *Went.* 288.

For suffering skins to be negligently destroyed by fire.

1st COUNT. — *On promise to take due care and indemnify against fire.*

For that on &c., at &c., in consideration that the plaintiff, at the special request of the said E, who was then and there a dresser of skins into leather, had delivered to the said E divers large quantities of skins, to wit, &c. of a large value, to wit, &c. to be by the said E dressed into leather for the plaintiff, for a certain reward, the said E promised the plaintiff, that he, the said E, would dress such skins for the plaintiff, and take due and proper care thereof, and also indemnify the plaintiff against any loss or damage of, or to the same, by the casualty of fire; and, although the said skins were afterwards, and whilst the said E had the same for the purpose aforesaid, to wit, on &c., at &c., damaged and destroyed by the casualty of fire, and thereby wholly and entirely lost, and although the said E was then and there required by the plaintiff to indemnify him against such loss and damage; yet the said E did not, nor would then and there indemnify, nor hath yet indemnified the plaintiff against the said loss and damage, but wholly refused and still refuses.

2d COUNT. — *On promise to take care, and to dress the skins.*

And for that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, then and there being a dresser of skins into leather as aforesaid, had delivered to the said E, in way of his trade and business of a dresser of skins as aforesaid, divers other large quantities of skins, to wit, &c., of a large value &c. to be dressed into leather for the plaintiff by the said E, the said E promised the plaintiff to *dress accordingly such last mentioned skins for the plaintiff*, and to take due care thereof; yet the said E, though he accepted thereof for the purposes aforesaid, did not, whilst he had such skins last mentioned, take good and proper care thereof, but omitted and neglected so to do; and on the contrary, whilst such last mentioned skins were in his possession, under the bailment, *and for the*

purposes last aforesaid, to wit, on &c., at &c., took so little and such bad care thereof, and kept the same so negligently, that they became and were thereby burnt, damaged, destroyed, and consumed by fire, and thereby wholly lost to the plaintiff.

3d COUNT. — *On promise to take due care.*

And for that &c., (*as in the last count omitting the parts in italics.*)

4th COUNT. — *On promise to redeliver, &c.*

And for that the said E so being a dresser of skins into leather, on &c., at &c., in consideration that the plaintiff, at the like request of the said E, hath delivered him divers other quantities of skins, to wit, &c., of a large value, to wit, &c., to be dressed by the said E for the plaintiff, for a certain reward, promised the plaintiff to redeliver to him the last mentioned skins, when and as the same should be dressed, and when requested; and the plaintiff in fact says, that the said D received the last mentioned skins for the purpose aforesaid; and, although afterwards, on &c., at &c., a certain large part, to wit, &c. had been and were dressed into leather, and were so dressed, in the possession of the said E, and although the plaintiff then and there requested the said E to redeliver him the same, and was then and there ready and willing, and tendered and offered to pay to the said E all charges for the dressing of the same; yet the said E did not, nor would then and there, or at any other time redeliver to the plaintiff the last mentioned skins, or any part thereof, so dressed as aforesaid, but refused and still refuses so to do.

5th COUNT. — *On promise to account, &c.*

And for that the said D, so being a dresser of skins into leather on &c., at &c., in consideration that the plaintiff at the like request of the said D had delivered him divers other large quantities of skins, to wit, &c. of a large value, to wit, &c. to be dressed into leather for the plaintiff, for a certain other reasonable reward, promised the plaintiff to dress accordingly the last mentioned skins, and to render him a reasonable and just account thereof, upon request; and, although the said D received the last mentioned skins for the purpose of so dressing the same, and, although a reasonable time for that purpose hath long since elapsed, and

although the plaintiff, on &c., at &c., requested the said D to render him a reasonable and just account of the same; yet the said D hath not yet dressed into leather, for the plaintiff, the last mentioned skins, or any part thereof, but refused, and still refuses so to do; and the same are wholly undelivered and unaccounted for unto the plaintiff. 2 *Went.* 111.

NOTE. Add a quantum valebant, "in consideration plaintiff had permitted defendant to retain and convert to his own use, divers large quantities of skins of the plaintiff," and the common counts for goods sold.

A bailee in this case would seem not liable, unless by a *special undertaking*, or for negligence. See an opinion, 2 *Went.* 114. (MSS.)

For not redelivering a note or paying for the same.

For that whereas, on &c., at &c., one A B was indebted unto the plaintiff, in the sum of \$20, due to the plaintiff from said A B upon a certain promissory note, before then made by the said A B to the plaintiff, for the payment of the said sum, at a certain time in said note mentioned, to the said plaintiff or her order; the said D, then and there, in consideration that the plaintiff, at the special request of said D, *would* deliver him the said note, promised the plaintiff to pay her the sum of \$18, on or before the first day of December, then next following, or otherwise to redeliver the said note to the plaintiff; *and the plaintiff avers that she, confiding in the said promise of the said D, at his request, at the time and place first aforesaid, delivered to the said D the said note*; yet the said D hath not yet paid the said \$18, or any part thereof, nor delivered the said note to the plaintiff, though on the first day of December aforesaid, at &c. aforesaid, and often afterwards requested, but has hitherto refused and still refuses so to do. *Plead. Assist.* 119.

Add a second count, in consideration plaintiff had delivered, &c., omitting the averment in italics.

13. *For not accepting and paying for goods, according to contract.*

For not accepting a watch, made for defendant, and paying for the same.

For that, on &c., at &c., in consideration that the plaintiff, who was then and there a watchmaker, at the special request of the said H, would make for the said H, a certain gold watch of a large value, to wit, of the value of \$100, the said H promised the plaintiff to pay him for said watch

the sum of \$100, upon delivery thereof; and the plaintiff avers, that confiding in the said promise of the said H, there- afterwards, to wit, on the same day and year, he made and finished the said watch, for the said H, at the price afore- said, and the same so made and finished, then and there tendered to the said H, and then and there requested the said H to pay him the sum of \$100 for the same; yet the said H, then and there refused to receive or accept the said watch, so tendered to him as aforesaid, and also refused to pay to the plaintiff the said \$100, and still neglects and re- fuses so to do. 2 *Went.* 130.

Add counts for a watch bargained and sold, and quantum meruit for work and labor as a watchmaker.

For not accepting residue of barley sold to defendant and paying for the whole.

1st COUNT. — *For not accepting barley chopped and screened.*

For that, on &c., at &c., in consideration that the plain- tiff, at the special request of the said D, had bargained and sold to the said D, a large quantity, to wit, twenty quarters of barley, *according to a sample then produced and deliver- ed to the said D*, at and for a large price, to wit, for so much of the said twenty quarters of barley as the plaintiff should deliver to the said D, screened and chopped, at and after the price of \$4 for each and every quarter thereof; and for so much of the said twenty quarters of barley, as the plain- tiff should deliver to the said D, screened only, and not chop- ped, at and after the price of \$3 for each and every quarter thereof, to be therefor paid by the said D to the plaintiff; and had then and there agreed to deliver the same at &c., according to the directions of the said D, the said D prom- ised the plaintiff to accept the said barley, and to pay for the same at and after the price aforesaid; and the plaintiff avers that he, on &c., at &c., did deliver to the said D di- vers, to wit, ten quarters of the said twenty quarters of bar- ley, *according to the sample so shown and delivered as afore- said*, screened and not chopped, and the said D thereupon, then and there accepted the same; and the plaintiff further says, that he always, from the time of the making of the said promise hitherto, hath been ready and willing, and af- terwards, on &c., at &c., offered to deliver to the said D ten quarters, residue of the said twenty quarters of barley, *according to the sample so shown and delivered to the said D as aforesaid*, screened and chopped, and then and there

requested the said D to accept the same, and pay, as well for the said barley so delivered as aforesaid, as for the said barley so offered to be delivered as aforesaid, at and after the price aforesaid, amounting in the whole to a large sum of money, to wit, the sum of 70 dollars; yet the said D, then and there refused, and always hitherto hath refused, to accept the said ten quarters of barley, so screened and chopped, or any part thereof, or to pay the plaintiff the said sum of \$70, or any part thereof, though requested so to do. 2 *Went.* 180. GRAHAM.

SECOND COUNT. *Like the first omitting the parts in italics.*

For not accepting barley sold.

THIRD COUNT. For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said H, had bargained and sold him other twenty quarters of barley, according to a sample then and there produced and delivered to the said H, at the rate and price of \$4 per quarter, for every quarter thereof, and the plaintiff had agreed to deliver the same last mentioned barley to the said H, at &c., the said H promised the plaintiff to accept the said barley, and to pay him therefor at the price aforesaid; and the plaintiff avers, that afterwards, on &c., at &c., he delivered the said H ten quarters, parcel of the said twenty quarters of barley last mentioned, and the said H then and there accepted the same; and the plaintiff further says, that, from the time of his promise aforesaid hitherto, he hath been ready and willing, and afterwards, on &c., at &c., offered to deliver the remaining ten quarters of said barley, to the said D, and then and there requested the said D to accept the same and to pay the plaintiff, as well for the barley last delivered as aforesaid, as for the barley then offered to be delivered as aforesaid. Yet the said H then and there refused to accept the said last mentioned remaining quarters of said barley, or any part thereof, or to pay the plaintiff for the said last mentioned twenty quarters of barley, or any part thereof, and still refuses so to do.

Add the common counts, indebitatus assumpsit and quantum meruit for goods sold, &c.

For not accepting opium sold, and paying for the same.

For that whereas, on &c., at &c., the plaintiff bargained

and sold, and caused and procured to be bargained and sold, for and on account of the plaintiff, unto the said D, who then and there bought of the plaintiff certain packages or parcels of opium, to wit, six boxes of opium of the plaintiff, as and for merchantable opium, *and as then and there being in the whole, as good as a certain package thereof, then and there shown to and seen by the said D,* at a certain rate, and upon the terms following, to wit, at the rate of \$2 for every pound weight thereof, to be paid for by the said D in ready money, upon being allowed at the rate of two and a half per cent. discount on such payment, *and to be weighed off in fourteen days;* and thereupon, then and there, in consideration of such sale, and in consideration that the plaintiff, at the special request of the said D, then and there promised the said D, that the said opium, so bargained and sold, *should be weighed off and delivered to the said D, in the time aforesaid, and at the rate and terms aforesaid, and that the same were then and there merchantable opium, and the whole thereof, as good as the said package thereof, seen as aforesaid by said D,* the said D promised the plaintiff to accept of, and take the said opium upon the terms aforesaid, and to pay the plaintiff for the same accordingly; and the plaintiff in fact saith, that the said opium, so bargained and sold at the rate aforesaid, and deducting the discount aforesaid, amounted to a large sum of money, to wit, the sum of \$1000, whereof the said D on &c., at &c., had notice; and that the said opium was then and there merchantable, *and the whole thereof as good as the said package thereof, seen as aforesaid by the said D;* and, *although the said opium was, within fourteen days from said sale thereof, weighed off;* and although the plaintiff was then and there, and always afterwards, ready and willing to deliver the same to the said D, according to the terms aforesaid, and although the said D might then and there have accepted the same, and was then and there requested by the plaintiff to accept the same, and to pay him therefor according to the rate aforesaid; yet the said D did not, nor would then and there, or at any other time, accept of, or pay the plaintiff for the said opium, or any part thereof, according to the terms aforesaid, but wholly refused and still refuses so to do. 2 *Went.* 186.

LAWES.

Add a second count, omitting the parts in italics; a third for goods sold and delivered, &c.

For not accepting hops and paying for the same ; to be delivered at a certain day, hour and place, earnest being paid.

For that whereas, on &c., at &c., a certain discourse was had and moved between the plaintiff and the said D of and concerning hops of that year's growth, in the county of Essex, and, upon that discourse, then and there, in consideration of ten cents by the said D, to the plaintiff in hand, paid in part of payment, and \$20, abating only the said ten cents, for every hundred weight of one cart load of hops, of the growth of the county of Essex, in the year abovesaid, to be paid on delivery of those hops by the said D to the plaintiff, at &c., on the 13th day of September, then next following, by 12 o'clock the same day, the said D promised the plaintiff that he, at the place, day, and hour aforesaid, would accept and then and there would pay the plaintiff, so much money as the said cart load of hops would amount to, at the rate aforesaid, upon the abatement aforesaid ; and the plaintiff in fact says, that he, on the said 13th day of September, in the year abovesaid, by 12 o'clock of the same day, at &c., had a load of hops of the growth aforesaid, and those hops, then and there weighed, and that those hops amounted to twenty hundred weight, and the plaintiff was then and there ready to deliver the said hops to the said D, at the price aforesaid, according to the agreement aforesaid ; yet the said D, the said twenty hundred weight of hops, amounting at the rate aforesaid, to the sum of &c., abating the said ten cents, of the plaintiff then and there wholly refused to receive, nor the said sum of &c., or any part thereof to the plaintiff hath paid, but though requested, yet doth refuse to do the same. *Hall v. Stanley.* 1 Lilly, 18.

Add count for hops sold.

For not accepting hops, and paying for the same ; to be delivered at a certain day and place, earnest being paid.

For that whereas, on &c., at &c., a certain discourse was had and moved between the plaintiff and the said D, of and concerning the buying and selling of hops, and, upon that discourse, it was then and there between them agreed, that the plaintiff should sell to the said D, a cart load, or twenty hundred weight of hops at the rate of \$20 for every hundred weight, the said hops to be delivered to the said D, in &c., on &c., of which said price the said D, the day, year, and place first mentioned, in hand paid the plaintiff ten cents, and the said D, at the same time and place, in con-

sideration that the plaintiff, then and there promised the said D, that he, the plaintiff, that agreement in all things on his part to be performed, well and faithfully would perform, promised the plaintiff that he, the said D, the said agreement, in all things on his part to be performed, would well and faithfully perform; and the plaintiff avers, that afterwards, on the said — day &c., he brought the said twenty hundred weight of hops, and delivered them on the same day, at &c., in a certain place there, called &c., and then and there gave notice to the said D of the same; and the plaintiff, the said twenty hundred weight of hops, then and there left, where said hops have hitherto remained ready to be carried away by the said D, at his will; yet the said D, those hops to accept, or to pay the plaintiff for the same, according to the agreement aforesaid, hath refused, and still doth refuse, though thereto by the plaintiff afterwards, to wit, the same day and year abovesaid, at &c., requested. *Tooler v. Archer*, 1 Lilly, 19.

For not accepting tow and paying for the same at a place certain.

1st COUNT. — *In consideration that plaintiff had bargained and sold defendant and had promised, &c.*

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said N, had bargained and sold the said N, a great quantity, to wit, three thousand eight hundred and twenty pounds of tow of the plaintiff, and had promised the said N to deliver him the same tow, at &c., the said N promised the plaintiff, that he, the said N, would accept of the plaintiff the said tow, at &c., upon request, and although the plaintiff afterwards, to wit, on &c., at &c., had the said tow ready to be delivered there to the said N, according to the plaintiff's promise aforesaid, whereof the said N then and there had notice, and the plaintiff was then and there ready and offered to deliver the said N the said tow, and requested the said N to accept the same; yet the said N has not accepted from the plaintiff the said tow, but has hitherto refused and still refuses to accept the same.

In consideration that plaintiff promised, &c.

SECOND COUNT. And for that on &c., at &c., the said H, in consideration that the plaintiff, at the special request of the said H, then and there promised the said H to deliver him at &c., certain other tow, to wit, three thousand eight hundred and twenty pounds, promised the plaintiff to

accept of the plaintiff the last mentioned tow, at &c., upon request, and to pay the plaintiff for the same, at the rate of \$2 by the hundred weight; and although the plaintiff afterwards, to wit, on &c., at &c., had the last mentioned tow, at &c., and was ready then and there to deliver the same to the said H, and thereof then and there gave notice to the said H, and offered to deliver him the same, and requested the said H to accept the same, and to pay the plaintiff the rate aforesaid, so to be paid for the same; yet the said H did not accept from the plaintiff the last mentioned tow, nor pay the plaintiff the said rate, to be paid for the same, or any part of the same. *Pleud. Ass. 107. HARDCASTLE.*

Add counts for goods sold and delivered, and quantum valebant for the same; and counts for goods bargained and sold, and a quantum meruit.

For not accepting hops and paying for the same; earnest being paid upon the bargain and subject to be vacated.

For that whereas, on &c., at &c., the plaintiff, at the request of the said E, sold the said E, and the said E then and there bought of the plaintiff, one ton weight of hops, of the middle growth of Essex, of the said year &c., at the rate or price of \$12 by the hundred weight, for every hundred weight thereof, to be therefor paid by the said E to the plaintiff, and it was then and there agreed between the said E and the plaintiff, that the plaintiff should deliver to the said E the said one ton of hops, at &c., on &c., and that the said E should accept the said hops on that day, at &c., from the plaintiff, and should pay the said rate or price for the same on delivery thereof; and it was then and there further agreed between the said parties, that if either of them should be desirous, at any time within one week from the time of making that agreement, to vacate said agreement, that then such party, so desirous to vacate the same, should pay the other of them \$20, on &c., at &c., and in such case, the said agreement, as to the bargain and sale of said hops, should be void; and the said agreement being so made &c., (*add mutual promises;*) and to make the said agreement the more firm and binding, the said E then and there paid the plaintiff the sum of \$5, in part payment of the said rate or price, so to be paid by him to the plaintiff for said hops; and the plaintiff avers, that the said agreement was not any way vacated, by either of the said parties, and the plaintiff further avers, that he, on &c., at &c.,

was ready and willing, and offered to deliver to the said E the said hops, and then and there required him to accept the same, whereof the said E then and there had notice ; yet the said E would not, nor did accept or receive the said hops, then or at any other time, nor hath he yet paid the said price for the same, or any part thereof, except the said \$5, although then and there, thereto requested, but refused and still refuses so to do.

Add count on account stated, for hops sold and delivered, &c. Morgan's Prec. 126.

Factor v. Principal, for not accepting goods bought and paying for the same ; part delivery being made.

For that whereas, on &c., at &c., the said E retained and employed the plaintiff, as his agent or factor, to purchase for him one thousand bushels of barley ; and it was then and there agreed between the said E and the plaintiff, that the plaintiff should purchase the said one thousand bushels of barley, at as cheap a rate as he could, and that the plaintiff should deliver the same, when bought as aforesaid, at &c., or thereabouts, on board such vessel as the said E should send for that purpose, and that the said E should pay to the plaintiff all such money as he should pay for said barley, and also a commission of two cents per bushel, for the buying of said barley by the plaintiff ; and the said agreement being so made, the said E then and there (*insert mutual promises ;*) and the plaintiff saith, that in pursuance of the said agreement, he afterwards, as soon as he could, to wit, on &c., at &c., did purchase for the said E, as his agent or factor, one thousand bushels of barley, at as cheap a rate or price as he could, and afterwards delivered five hundred bushels thereof, on board a certain sloop or vessel, at &c., or thereabouts, and which the said E had sent there for that purpose, and always since the purchase of the said one thousand bushels of barley, hitherto hath been ready to deliver the remaining five hundred bushels of the said barley to the said E according to the said agreement ; and that he, the plaintiff, paid for the said one thousand bushels of barley a large sum of money, to wit, &c., of all which premises the said E, on &c., at &c., had notice ; yet the said E hath not paid the plaintiff the said money, so paid by the plaintiff for the said barley, nor any part thereof, nor the said commission for buying the same, or any part thereof, nor hath the said E sent any vessel or vessels to &c., or there-

abouts, to take on board the remaining five hundred bushels of said barley, although thereto, on &c., at &c., requested, but wholly refused, and still refuses so to do. 2 *Went.* 160.

WARREN.

Add the common counts for goods sold and delivered ; money lent and advanced ; laid out and expended, &c.

For not accepting and paying for cotton imported.

For that whereas the plaintiff, on &c., was possessed of a large quantity of good cotton, to wit, one hundred and fifty bags, and then, being in parts beyond the seas, and about to be imported by the plaintiff into this commonwealth, to wit, at &c., and thereupon the said E, well knowing the premises, afterwards, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, had then and there bargained and sold to the said E, divers, to wit, from fifty to one hundred bags of said cotton, upon certain terms then and there agreed upon between the said E and the plaintiff, and also, in consideration that the plaintiff had, then and there, promised the said E to deliver him one hundred bags of said cotton, if so many should arrive and be imported into this commonwealth, by the plaintiff, (and warranted) first or good seconds, if not, an equitable allowance to be made to the said E for the same, so soon after such arrival as the same should be in a merchantable condition, promised the plaintiff to accept from him one hundred bags of the said cotton, upon such delivery, and upon the terms agreed upon between them as aforesaid, if so many should be imported into this commonwealth by the plaintiff as aforesaid ; and the plaintiff in fact saith, that afterwards, to wit, on &c., at &c., he did import into this commonwealth one hundred bags of second cotton, and afterwards, as soon as the same was in a merchantable condition, to wit, on &c., at &c., he offered to the said E one hundred bags of the said cotton, upon the terms aforesaid ; yet the said E, then and there refused to accept the said one hundred bags of cotton from the plaintiff, and did not accept the same and still refuses to accept the same, nor hath the said E yet paid the plaintiff for the same, according to the terms aforesaid. 2 *Went.* 193.

Add counts for goods bargained and sold, &c.

For not fetching and carrying away cord-wood and paying for the same by surviving partners.

For that whereas the said E, on &c., at &c., bought of

the plaintiffs and one A, now deceased, in the lifetime of the said A, thirteen cords of cord-wood, at the rate of \$5 a cord for every cord, to be paid by the said E to the plaintiffs and the said A, for the same; and it was then and there agreed between the plaintiffs and said A and the said E, in the lifetime of the said A, that the plaintiffs and the said A, should and would deliver the said cord-wood to the said E, upon request, and that the said E should and would within a little time, next after the said sale thereof, fetch, take, and carry away the said cord-wood, and that the said E, at the time of his so taking and carrying away the same, should pay unto the plaintiffs and the said A, the rate and price aforesaid, so to be paid for the same; and thereupon, thereafterwards, on the same day and year, in consideration that the plaintiffs and the said A, in the lifetime of said A, promised the said E to perform and fulfil every thing in said agreement, on their parts to be performed and fulfilled, the said E promised the plaintiffs and the said A, in the lifetime of said A, to perform and fulfil every thing in said agreement on his part to be performed and fulfilled; and the plaintiffs in fact say, that the plaintiffs and the said A, in the lifetime of said A, always from the time of making the said agreement, and since the death of said A, the plaintiffs hitherto have always been ready to deliver the said cord-wood to the said E, and have often offered so to do, to wit, at &c.; yet the said E hath not yet fetched, taken, or carried away the said cord-wood, or any part thereof, or paid to them or any of them, for the same or any part thereof, at and after the rate and price aforesaid, although thereto, on &c., before and afterwards requested, but wholly refused and still refuses so to do. *Plead. Assist.* 101. WARREN.

Add counts for goods sold, delivered, and quantum valebant.

For not accepting and taking away a rick of rye grass, to be delivered at a certain place, earnest being paid by defendant.

For that on &c., at &c., in consideration that the plaintiff, at the special request of the said E, had bargained and sold the said E a certain rick of rye grass, then being in a certain yard or fold of the plaintiff, in &c., then in possession of the plaintiff, at the rate and price of \$100, to be paid by the said E to the plaintiff, for the same, and had promised the said E, to permit him to thresh the same in the plaintiff's barn there, the said E promised the plaintiff that he, the said E, would on Tuesday then next following, accept the

said rye grass, at the rate and price aforesaid, and would then take the said rye grass into his own possession, and pay the plaintiff for the same; and, although the plaintiff ever since the making of said bargain, was ready to deliver the said rye grass to the said E, and to permit him to thresh the same in the plaintiff's barn there: and although the said E, there- afterwards, on the day and year aforesaid, paid the plaintiff \$10, in part of the rate or price aforesaid; yet the said E hath not, at any time hitherto, accepted or taken the said rye grass into his possession, but hath ever since suffered the same to remain in the said yard or fold of the plaintiff; nor hath the said E paid the plaintiff the residue of the rate or price aforesaid, although then and there, and often after- wards, thereto requested, but refused and still refuses so to do. *Morg. Preced.* 128.

Add indebitatus assumpsit and quantum meruit for goods sold, and for use and occupation of plaintiff's yard.

For not taking away beans sold, to be delivered on request and paid for at a day certain, earnest being paid by defendant.

For that whereas, on &c., at &c., it was agreed between the plaintiff and the said E, in manner following, to wit, that the plaintiff should sell the said E ten loads of beans of the plaintiff, which then lay in the shop of &c., at &c., at the rate of \$2 for every load thereof, and that the said beans should be delivered to the said E by the plaintiff, upon request, and that the said E should pay the plaintiff for the same, the rate aforesaid, at or upon the first day of &c., next following; and thereupon &c. (*add mutual promises*;) and although the said E, at the time and place of making said agreement, paid the plaintiff ten cents, in part of the rate aforesaid; yet the said E hath not sent for, requested to be delivered, or taken away the said beans, or any part thereof, nor hath paid the residue of the rate aforesaid, to wit, &c., or any part thereof, *although on &c., at &c., requested*, and although the plaintiff hath been always, from the making of said agreement hitherto, and still is, ready to deliver the same to the said E, at &c., but wholly refused and yet refuses so to do. *2 Went.* 139.

NOTE. The averment in italics should seem unnecessary, either on the ground of earnest being paid, according to the case of *Bach v. Owen*, 5 T. Rep. 409; or on the ground of mutual promises, according to Hob. 88, *Nicholas v. Rainbred*; and 1 Wils. 88, *Martindale v. Fisher*; or, on the ground of mutual remedies, and the money being to be paid at a day certain. 1 Salk. 171; 6 T. Rep. 570, &c. (MSS.)

For not fetching away ashes sold to defendant to be delivered from time to time, when made.

For that whereas, at the time of making the promise hereinafter mentioned, the plaintiff was, and thence hitherto hath been, a chandler, and used the business of a chandler, and in so doing, hath, during all that time, made divers large quantities of ashes, to wit, at &c. ; and the plaintiff so making ashes at the special request of said E, on &c., at &c., sold the said E all the ashes, which he, the plaintiff, should use in the way of his business aforesaid, within the space of one year then next ensuing, at the price of \$1 a cart load, to be therefor paid by the said E to the plaintiff, and promised the said E to deliver him the said ashes, from time to time, as the said E should come and take and fetch away the same, and in consideration thereof, the said E promised the plaintiff to come and take and fetch away the said ashes, from time to time, as the same should be made, and to pay the said price for the same to the plaintiff; and though the plaintiff daily, during said year, there made, in his said trade, a large quantity, to wit, one cart load of ashes, of which the said E had due notice, and was frequently, during that year, from time to time, and at the end thereof, required by the plaintiff to come and take and fetch away the said ashes; and the plaintiff was always ready to deliver all the said ashes, from time to time, according to the terms aforesaid; yet the said E did not, when so requested, or at any other time hitherto, accept, fetch, or take away the said ashes, or any part thereof, [or pay the plaintiff for the same,] but wholly refused and refuses so to do. 2 *Went.* 223. WARREN.

Add counts for goods sold and delivered; goods bargained and sold, but not fetched away.

14. *Against Carriers, &c.*

Consignor v. Carrier, for negligence in the carriage of goods, whereby they were lost.

1st COUNT.—*On a promise to deliver safely at C, to the use of consignee according to address.*

For that, on &c., at &c., in consideration that the plaintiffs did then and there deliver to the said E, at his special request, a parcel of goods of the plaintiffs, to wit, &c., a parcel of goods containing silk ferrets and other merchandise, of great value, to wit, &c., directed to Messrs. A and

B, of &c., to be carried and conveyed by the said E, from M aforesaid, to the city of C, and there, to wit, at C aforesaid, to be safely delivered to the use of Messrs. A and B, of &c., and had then and there paid to the said E, fifty cents as a reasonable reward for his care and trouble in that behalf, the said E promised the plaintiffs, safely and securely, to take care of, carry and convey the said parcel of goods and to deliver the same at said C accordingly; yet the said E did not take care of, carry, and deliver the said parcel of goods, in manner aforesaid, but hath neglected so to do, and by the negligence of himself and his servants, lost the same.

2d COUNT.—On a promise to carry to C, and forward to G, according to address.

And for that, on &c., at &c., in consideration that the plaintiffs, at the like request of the said E, had delivered to the said E, a certain other parcel of goods of the plaintiffs, to wit, a parcel of goods containing other silk ferrets and merchandise, of great value, to wit, &c., directed to the said Messrs. A and B in G, to be carried and conveyed by the said E, from said M to said city of C, and from thence to be forwarded to the said Messrs. A and B, at G aforesaid and had then and there paid the said E, the further sum of fifty cents, as a reasonable reward for his care and trouble in this behalf, promised the plaintiffs safely and securely to take care of, carry and convey the last mentioned parcel of goods and forward the same accordingly; and although the said last mentioned parcel of goods, might have been carried and conveyed to said C, and thence forwarded to said G, and although the said E hath been often requested so to do, yet the said E hath not yet carried, conveyed, or forwarded the same in manner aforesaid; and for want of due care, and through the mere neglect of the said E, the same hath been and is wholly lost to the plaintiffs.

For a concise view of the law of Common Carriers, see Law Summary, p. 357.

NOTE. A common carrier is responsible for any damage which happens to goods entrusted to his care, except where it happens from the act of God or of the public enemy.

The owner of a hackney coach is not a common carrier, for this purpose, and is not liable for the loss of goods, unless there is an express agreement. Otherwise of the owner of a stage-coach. The reason of the difference is, that the hackney coach is used for the transportation of passengers only, and receives no hire for the carriage of goods; but

it is otherwise of a stage-coach, which usually carries goods as well as passengers for hire. See 2 B. & P. 416, 419.

Where a customer knows that goods are exposed to some particular risk and omits to inform the carrier, in case of a loss thereby, the carrier is not answerable. 1 East, 604.

Notwithstanding a special acceptance, limiting the responsibility of carriers, they are answerable in cases of gross negligence. 2 Barn. & Ald. 356; 6 Mo. 469.

With regard to the question, by whom the action should be brought for the loss of a parcel, the rule in Comyns on Contracts is laid down to be, "where the consignor is to pay for the carriage of the goods, and cannot charge the consignee upon the delivery to the carrier, the action should be brought in his name; but where the consignee orders the goods to be sent by a particular carrier, to whom they are delivered, or is liable in the ordinary course of trade to pay for them upon the delivery to the carrier, the action must in general be brought in the name of the consignee."

It seems, however, when goods are delivered by the consignor to a carrier, pointed out by the consignee, the property, on a delivery to the carrier, is in the consignee, and, notwithstanding the consignor paid the carrier, the action must be brought in the consignee's name. 1 L. Raym. 271; 8 T. R. 330.

A carrier may be sued for any loss or damage happening to goods delivered to him, either in Assumpsit or Case, but in making a choice, it will be well to recollect that Case may be joined with a count in trover, where the circumstances will warrant it, but Assumpsit cannot; and that an omission of any of the joint contractors, will be cause of abatement in Assumpsit; but an omission of a like kind in Case, generally, will not.

Carrier v. Porter, for negligently losing goods, and which carrier was obliged to pay for.

1st Count. — *On promise to carry safely.*

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, had then and there caused to be delivered to the said E, divers goods and chattels, to wit, &c., of a large value, to wit, &c., to be by the said E, safely and securely carried and conveyed from a certain place at M aforesaid, called &c., to a certain other place at M aforesaid, called &c., and there, to wit, at the last mentioned place, to be safely and securely delivered for the plaintiff, *for a certain reasonable reward to be therefor paid by the plaintiff*, the said E promised the plaintiff, safely and securely, to carry and convey the said goods and chattels, from the said place called &c., in M aforesaid, to the said place called &c., in M aforesaid, and there, to wit, at the last mentioned place, safely and securely to deliver the same for the plaintiff; yet the said E did not deliver, nor hath as yet delivered the said goods and chattels, or any part thereof, at the said place, called &c., or elsewhere, to or for

the plaintiff, but, on the contrary, afterwards, to wit, on &c., at &c., so negligently behaved in carrying and conveying the said goods and chattels, that the same, for want of due care, and by reason of the negligence of the said E, were then and there wholly lost to the plaintiff.

2d COUNT. — On promise to keep safely and deliver on request.

And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said D, had then and there delivered, and caused to be delivered to the said D, certain other goods and chattels, to wit, &c., of a large value, to wit, &c., to be by the said D, safely kept for and delivered to the plaintiff, upon request, the said D promised the plaintiff safely to keep the last mentioned goods and chattels, and to deliver them to the plaintiff upon request; and although the said D received the last mentioned goods and chattels, on such bailment as aforesaid, and was afterwards, to wit, on &c., at &c., requested to deliver the same to the plaintiff; yet the said D did not keep the same safely, and so deliver the same to the plaintiff, when so requested as aforesaid, nor hath yet delivered the same; but, on the contrary, took so little and such bad care thereof, that the same were and are, by the mere negligence of the said D, wholly lost to the plaintiff. 2 *Went.* 234.

Add a third count, like the first, omitting the part in italics.

If a carrier trusts the goods with his porter, (as in this case,) and the porter loses them, the carrier may maintain an action against the porter, for he has a special property in the goods; and a declaration like the above would be good, even though the carrier had not paid over for the loss; for the porter would never be admitted to show that the goods were only bailed to the carrier, in order to discharge himself. *See an opinion,* 2 *Went.* 237; and 1 *Bac.* 237; 1 *Roll. Abridg.* 607. (MSS.)

Against the proprietor of a stage-coach, for not carrying plaintiff the whole of his journey.

For that the said D, [defendant] on &c., at &c., was proprietor and owner of a certain common coach or carriage, going and passing from B to N, and so back from N to B, for the carriage and conveyance of passengers; and in consideration that the plaintiff, at the special request of the said D, would then and there take and engage one place in said coach or carriage, for the plaintiff to be conveyed as a passenger therein from said N to said B, for a reasonable fare to be paid therefor by the plaintiff to the said D, then and there promised the plaintiff to carry and convey him in said

coach or carriage from said N to said B. And the plaintiff avers, that, giving credit to the said promise of the said D, he then and there did take and engage one place in the said coach or carriage, for him, the plaintiff, to be carried and conveyed from said N to said B, as aforesaid, and that the said D, in part performance of his said promise, did, on &c., convey the plaintiff from said N, part of the way to said B, viz. to S; yet the said D, though requested, would not carry the plaintiff any farther on said journey to said B, but wholly neglected and refused so to do; whereby the plaintiff was put to great charges to complete his journey to said B, &c. See 3 *Went.* 240.

By bailee against carrier, for negligence in transportation of goods whereby they were lost.

For that the plaintiff, on &c., at &c., had received a certain parcel of goods, of the value of \$100, to be by him transported from N to B, and there safely delivered to one C, and had in fact carried the said parcel from said N to S; and afterwards, on &c., at said S, the plaintiff, at the special request of the said E, delivered the said parcel to him to be safely conveyed by the said E, from thence to said B, and there safely delivered to the said C, for a certain reward to be paid to the said E therefor, by the plaintiff; whereupon, in consideration of the premises, the said E, at the last mentioned time and place, promised the plaintiff safely to convey the said parcel from said S to said B, and there to deliver the same safely to the said C. Now the plaintiff says, that though the said E had received the said parcel for the purpose aforesaid, yet not minding his promise aforesaid, he did not safely convey the said parcel from S aforesaid to B aforesaid, and there safely deliver the same to, or to the use of, the said C; but on the contrary, so negligently behaved, and carelessly conducted in the premises, that the said parcel was, by the negligence and want of care of the said E, totally lost; whereby the plaintiff was obliged to pay the value of said parcel, and divers other expenses incurred in consequence thereof. See 3 *Went.* 246.

Add a count, in consideration that the plaintiff had delivered a parcel to the defendant, to be carried, &c.; and also a count for not delivering in a reasonable time the goods of plaintiff bailed to defendant.

Against proprietor of a stage-coach, by passenger, for loss of luggage.

For that the said D, [deft.] on &c., at &c., was the owner and proprietor of a certain stage-coach, for the carriage

and conveyance of passengers, with their reasonable luggage, from said S to B, for a certain reasonable reward and hire to be paid therefor; and then and there, in consideration that the plaintiff had, at the special request of the said D, taken a place in said coach as a passenger from said S to said B, and promised to pay therefor at the accustomed rate and price, and had then and there delivered to the said D, a certain box of the plaintiff, containing goods and clothes, of the value of &c., which the plaintiff avers was his reasonable luggage, as such passenger as aforesaid, promised the plaintiff safely to convey him from said S to said B, and at said B safely to deliver him the said trunk and its contents. And the plaintiff says, that though the said D so received the said luggage, and afterwards, on &c., conveyed the plaintiff from said S to said B; yet though requested in a reasonable time afterwards, viz. on &c., at &c., the said D never delivered the said trunk and its contents to the plaintiff at said B, but so negligently carried the said trunk and its contents, and took so little care thereof, that the same was totally destroyed and lost by the negligence of the said D. *See 3 Went. 254.*

Add a count for goods delivered to carrier for reasonable reward.

Against a water carrier, for negligently carrying goods whereby they were spoiled.

For that the said D, [defendant,] on &c., at &c., in consideration that the plaintiff had, at the special request of the said D, delivered to him two hundred bushels of corn, of the value of \$100, to be safely conveyed by the said D, for a certain hire, from said S to B, on board a certain barge belonging to said D, then lying at said S, then and there promised the plaintiff, safely to convey the same from said S to said B, and there, at said B, to deliver the same to the plaintiff within a reasonable time; yet the said D, not minding his promise aforesaid, though a reasonable time has long since elapsed, since the delivery aforesaid of the said corn to the said D, for the purpose aforesaid, viz. — days, and though afterwards, on &c., at &c., requested thereto, hath never safely carried and delivered the said corn to the plaintiff at said B, but hath wholly neglected so to do; and, on the contrary, hath so carelessly conducted himself in the premises, that by his negligence and default, the said corn has been wetted, and thereby wholly destroyed. *See 3 Went. 260.*

Against water carrier for not delivering goods.

For that the said D, [defendant,] at &c., on &c., was a common carrier, for a certain hire and reward, of goods, wares, merchandises and moneys, from said F to B, in the county of S, and from thence to said F; and on the same day, at said F, received of the plaintiff one sum of \$100, to be carried from said F to said B, and there delivered to T R, Esq., dangers of the seas excepted; and the said plaintiff then and there promised the said D, to pay him as much money for carrying the same, as he reasonably deserved therefor, on demand; by reason of all which, and by the law and custom of the land, the said D became and was obliged to carry said money safely and deliver the same to the said T R, dangers of the seas only excepted, as afore-said, and in consideration thereof, then and there promised the plaintiff to do it accordingly; yet the said D hath never carried and delivered the same money to the said T R, though a reasonable time hath therefor elapsed, and though on &c., at &c., requested thereto; nor hath the said D re-delivered the same to the plaintiff, though alike requested, but wholly neglects and refuses so to do.

For not delivering money to a third person, according to promise.

For that the said D [defendant] on &c., at &c., in consideration that the plaintiff had then and there delivered him \$20, promised the plaintiff to deliver the same, on the same day, to one C at B; yet the said D, not minding his said promise, did not deliver the same money on the same day to the said C, but neglected and still wholly neglects so to do; whereby the plaintiff has been impleaded in an action for the same by the said C, and put to great charges, viz. the sum of \$30; all which is to the damage, &c.

15. *For not accounting for goods, &c.; in nature of Account.* [See under ACCOUNT, ante.]

For not accounting for proceeds of fish delivered to be transported and sold.

For that the said D, having received of the plaintiffs — quintals of fish, of the value of &c., for his reasonable allowance, to be transported from &c., to &c., the dangers of the seas excepted, and there to dispose thereof to the plaintiffs' best advantage, and thereof to render to them his reasonable account on demand, in consideration thereof, then

and there promised the plaintiffs to transport, dispose of, and render his reasonable account of said fish, as aforesaid; and the plaintiffs say that the said D transported said fish to &c., accordingly, and sold it to great profit there at said &c.; yet &c.

W. PYNCHON.

Against surviving bailiff, for not rendering an account of merchandise delivered to be disposed of, &c.

For that the said E and one B, who is since deceased, and whom the said E survived, at &c., from &c., to &c., were the plaintiff's bailiffs, of the articles, goods, and merchandises [mentioned in the annexed schedule] of the value of &c., to dispose thereof to the plaintiff's best advantage, and thereof to render the plaintiff their reasonable account on demand, and in consideration of the premises, the said E and B, then and there, in the lifetime of the said B, promised the plaintiff to do the same accordingly; yet, though requested, the said E and B, in the lifetime of said B, never rendered their reasonable account, as aforesaid, to the plaintiff, nor hath the said E, since the death of said B, though requested, rendered any reasonable account as aforesaid, but they, and each of them, neglected, and the said E still refuses so to do.

For not rendering an account of goods delivered, to be sold for plaintiff's best advantage, &c.

For that the said D, at Cadiz, viz. at &c., on &c., received of the plaintiff, — quintals of fish, of the value of &c., for his reasonable allowance, to sell and dispose of the same for the plaintiff's best advantage, and to make his remittance of the nett proceeds of the sale, after deducting the freight in the following manner, viz. to purchase and bring home, twenty boxes of lemons, &c., and to remit the remainder of the same nett proceeds, before he, the said D, left the port, to Messrs. K and P of &c., on the plaintiff's account, and to render the plaintiff his reasonable account thereof; in consideration whereof, the said D, then and there promised the plaintiff to dispose of said goods, make the remittances, and render his account as aforesaid; yet, &c.

PRATT.

For not accounting with plaintiff for the profits of a sum of money, received by defendant, to be improved for the use of the plaintiff and his sister, deceased since. Against executor of promisor.

For that the said A, in his lifetime, viz. on &c., at &c., received \$—, which belonged to the plaintiff and his sister

E, since deceased [and the plaintiff and the said E, were then the only children and heirs of one P, then lately deceased] to use and improve the same sum, for the benefit of the plaintiff and the said E; and the said A, then and there, in consideration thereof, promised the plaintiff and the said E, then living, to lay out and improve the same sum to their best profit and advantage and to render them his reasonable account thereof on demand. Now the plaintiff avers, that the said A laid out the same sum to great advantage, and made a large profit therewith; yet though often requested he never rendered to the plaintiff and to the said E, in her lifetime, or to either of them, an account of the said sum, or the profits thereof; and the plaintiff further avers, that the said E died before the said A, and that this action accrued to the plaintiff as surviving promisee, as aforesaid, yet neither the said A, in his lifetime, though requested, nor the said D, his executor, as aforesaid, ever rendered the plaintiff any account of the said sum, or the profits thereof, but the said D wholly refuses so to do.

For not accounting with plaintiff for his share of fish received by defendant to make, cure, and sell for him, &c.

For that the plaintiff, with the rest of the fishing crew of the schooner &c., at sundry times, between &c., at &c., delivered to the said D — quintals of fish, of the value of &c., caught in said schooner during that time, to make, cure, and sell, for his reasonable allowance, to the best advantage of the plaintiff, and the rest of the crew, and thereof to render to them his, the said D's, reasonable account of their several parts of the said fish; now the plaintiff avers, that he is entitled to &c., parts of the said fish, of which the said D, on &c., at &c., had notice, and, in consideration thereof, then and there promised the plaintiff to account with him therefor on demand; yet, &c.

For not accounting with plaintiff for the share of fish belonging to his minor son.

For that the plaintiff, at the request of the said D, on &c., at &c., sent his, the plaintiff's, son and servant C a fishing voyage, in the said D's schooner &c., and the said C continued in the service until &c., and caught &c. codfish of the value of &c., which, with the rest of the fare, were thereafterwards, on &c., delivered to the said D, as shoreman, and the said D, in consideration thereof, then and there promised the plaintiff to render him his reasonable account

of the fish caught by the said C as a cuttailman; yet the said D, &c.

J. READ.

For not transporting and delivering goods, laden on board a vessel, of which defendants were owners.

For that the said plaintiff, at B, to wit, at said N, on &c., loaded in and upon their schooner called &c., the several goods and merchandises, as by the schedule hereunto annexed, to the value of &c., in good order and well conditioned, to carry from the said port of B, to the island of B, in the W. I.; the said plaintiff to pay the said D, E, F, G, H, and I, the sum of &c., for the freight of said goods and merchandises, in consideration of all which, the said D, E, F, G, H, and I, then and there assumed upon themselves, and promised the plaintiff to transport and deliver the said goods and merchandises to the said plaintiff or his assigns at said B, in like good order and well conditioned, the dangers of the sea only excepted. Now the plaintiff avers, that he hath been always ready at said B to receive said goods and merchandises, and to pay the freight thereof. Nevertheless, the said D, E, F, G, H, and I, though no dangers of the seas prevented, have never transported and delivered the said goods and merchandises to the plaintiff or his assigns, nor hath either of them transported and delivered the same, but they neglect so to do. *Arthur v. Cole, Essex, 1790.*

T. BRADBURY.

For not paying over to the plaintiff the proceeds of an adventure, delivered to the defendant on half profit.

For that whereas the said E received of the plaintiff, eight maple desks, of the value of &c., to carry to the W. I. upon the account and risk of the plaintiff, and the said E, by his note under his hand, then and there promised to pay the plaintiff on his return from the W. I., home to S aforesaid, the prime cost of the said desks, which the plaintiff avers to be &c., with one half of the profits he should make of the same; now the plaintiff says, that the said E afterwards arrived safe at the W. I., and there sold the same desks for twelve and a half pistoles, being of the value of &c., and has since, to wit, afterwards on &c., returned home to S aforesaid, whereupon, according to his promise aforesaid, he ought to have paid the plaintiff &c., the prime cost of the said desks, and half the profits made thereof; yet, though requested, he hath never paid the same, but refuses.

For not accounting for the proceeds of an adventure.

FIRST COUNT. For that whereas the plaintiffs at &c., on &c., had delivered and caused to be delivered to the said C, twenty pieces of Russia sheeting, of the value of &c., on board the brig &c., whereof the said C, then was and now is master, to be disposed of by the said C, for the plaintiffs at &c., or any other port in &c., to which the said C should go upon his then intended voyage in said brig, at and for the best price and value that the said C could obtain for the same and for him to invest or lay out the proceeds thereof, in such articles or merchandise there, as he should judge advantageous for the interest of the plaintiffs, and to account for and deliver the same to the plaintiffs; in consideration whereof the said C then and there promised the plaintiffs, that he would dispose of the said twenty pieces of Russia sheeting for the plaintiffs, at &c., or any other port in &c., to which he, the said C, should go, in his then intended voyage in said brig, at and for the best price or value, that he, the said C, could obtain for the same, and that he would lay out and invest the proceeds thereof, in such articles or merchandise there as he should judge most advantageous for the interest of the plaintiffs, and that he would account for and deliver such articles and merchandises to the plaintiffs on demand. And the plaintiffs aver, that the said C did go with the said brig upon said voyage to &c., and did carry all the said sheeting therein, and did at that place sell and dispose of the same, at and for the price of &c., and that the duties and customary commissions paid the merchant there being deducted from that sum, the proceeds of said sheeting there amounted to &c.; and further, that the said C did there, on &c., lay out and invest the said proceeds of said sheeting, in the articles following, *viz.* &c.; yet the said C though often requested, hath not accounted for, paid or delivered the said &c. [the merchandise] to the plaintiffs, or either of them, but wholly neglects and refuses so to do.

SECOND COUNT. And for that whereas, at &c., on &c., the plaintiffs had delivered to the said E, other twenty pieces of Russia sheeting, but of the same value, as their adventure, on board the brig &c., whereof the said E then was, and now is master, for him to sell and dispose of, for the best price or value that could be obtained therefor, and to account therefor to the plaintiffs on demand; in consideration

whereof, the said E then and there promised the plaintiffs, he would sell and dispose of the same sheeting last mentioned, at and for the best price and value, which could be obtained therefor; and that he would account for the said last mentioned sheeting, and pay the proceeds thereof to the plaintiffs, on demand. And the plaintiffs aver, that afterwards, on &c., at &c., viz. at &c., the said E did sell and dispose of the said last mentioned sheeting for the price of &c.; yet the said E, though often requested, hath not paid and accounted therefor to the plaintiffs, or to either of them, or for the said adventure, according to his promise; but hath wholly neglected and still neglects so to do.

THIRD COUNT. And for that whereas, at &c., on &c., the plaintiffs had delivered to the said D other twenty pieces of Russia sheeting, of the value of &c., as their adventure on board the brig &c., whereof the said D then was and now is master, for him to account therefor to the plaintiffs on demand; in consideration whereof, then and there, the said D, *by his note or memorandum in writing*, of that date, by him signed, promised the plaintiffs, that he would account to them for the said other sheeting last mentioned, on demand; yet the said D, though requested, hath never accounted for the said last mentioned sheeting, but wholly neglects so to do. [*Add the money counts.*] *Norris v. Rust, Nov. T. 1801, Essex.* S. PUTNAM.

Owners against master of ship, for neglect in disposing of their cargo, and refusing to account, and waste and embezzlement, &c.

For that the said T, on &c., at &c., in consideration that the plaintiffs had, then and there, at his request, made and appointed him master of their ship, called &c., then lying in the port of &c., bound and ready to sail from thence to some one of the French islands in the W. I. and back again, laden with the articles and cargo mentioned in the schedule hereto annexed, the same being the property of the plaintiffs, and of the price of &c., to be sold and disposed of by the said T in the W. I., for the plaintiffs' best advantage, and the net proceeds thereof to be laid out for the plaintiffs, as hereafter mentioned; and for the further consideration of the monthly wages of &c., paid and secured to be paid to the said T, at his request, for every month, which should be spent in performing and completing said voyage, and for the further consideration of five per cent. commis-

sions on the sales of all the outward bound cargo aforesaid, and two and a half per cent. commissions on the net proceeds of said cargo, to be received by said T out of the said cargo, and for the further consideration of the license and privilege, the plaintiffs then and there granted the said T, at his request, of bringing home from the W. I. to said &c., in said ship one thousand six hundred gallons, for his own use, free from freight, he, the said T, for the consideration, aforesaid, then and there promised the plaintiffs that he would embrace the first good wind, and put to sea in said ship, and proceed to some one of the French islands in the W. I., and there dispose of the said cargo, in the best manner he possibly could, for the advantage and profit of the plaintiffs, without making any bad debts in the disposal of the same, and that with the net proceeds of said cargo, he would purchase for the plaintiffs as much molasses as would fill said ship's hold, and would lay out the remainder of said net proceeds, after said molasses should be purchased as aforesaid, in one hogshead of good brown sugar, one thousand pounds of cocoa, if cocoa should be about the same price with coffee, and the residue thereof in good coffee, for the plaintiffs; that he would then proceed back in said ship, with the cargo purchased as aforesaid, to said &c., and there deliver the same to the plaintiffs, or their order, with a regular account of his proceedings touching the same, and that he would make the best despatch in performing said voyage, and that he would abridge every unnecessary expense in the same. Now the plaintiffs aver, that the said T proceeded on said voyage, in said ship, with said cargo on board, and arrived safe therewith, at &c., a French island in the W. I., and that he might there, to wit, at said &c., have disposed of his said outward bound cargo to such advantage for the plaintiffs, that with the net proceeds thereof he might well have purchased for the plaintiffs said ship's hold full of molasses, and also said sugar, cocoa, and a large quantity, to wit, twenty thousand pounds of coffee; yet the said T, in no wise regarding his promises aforesaid, but contriving to injure and defraud the plaintiffs, neglected and refused to lay out and dispose of his said cargo to the plaintiffs' best advantage, and also to purchase said molasses &c., and was extravagant and unreasonable in his expenses and charges, and neglected and still neglects, to wit, at &c., to exhibit to the plaintiffs an account of his proceedings in said voyage, but hath wasted and embezzled the

said cargo, to wit, at &c., and hath not in any wise performed his promises aforesaid, &c. T. PARSONS.

Owner v. Master ; for not delivering cargo to consignee, &c., and not accounting.

For that whereas the said T, at &c., from &c., to &c., was the plaintiffs' master of their ship F, in her to proceed from &c., to &c., in the Island of St. Domingo, in the W. I., and from thence back to &c. ; and whereas the said T, during that time, was the bailiff of said ship's cargo, consisting of certain goods, wares, and merchandise, a schedule whereof is hereto annexed, of the value of &c., to transport the same to said &c., in said ship, and there deliver the same to one H, to dispose of to the best advantage for the plaintiffs, and the net proceeds of the same to receive from said H, and therewith to purchase as much good merchantable molasses, as would load the said ship as deep as he might think prudent ; and the residue of the said net proceeds to lay out in the purchase of good cotton, coffee, or such articles as would yield the plaintiffs the best profit in said P ; and with the same to proceed to &c., unless the plaintiffs should order him elsewhere ; he, the said T, at &c., on &c., in consideration of the premises, and of the plaintiffs' allowing him the privilege of his adventure, then on board said ship, and of transporting in said ship to &c., one thousand two hundred gallons of molasses, freight free, and for the further consideration of the plaintiffs' agreeing to give him \$—, by the month, as wages, and six per cent. commissions on the sale of his outward bound cargo, being the articles aforesaid contained in said schedule, and two and a half per cent. commissions on what he should purchase for the plaintiffs for his homeward bound cargo, promised the plaintiffs, that he would proceed in said ship in said voyage with said cargo, and that, upon his arrival at &c., he would deliver the said cargo to said H, to be disposed of to the plaintiffs' best profit, and would lay out as much of the net proceeds thereof, as would purchase as much molasses as aforesaid, and the residue thereof he would lay out in good cotton, coffee, or such articles as would yield the best profit for the plaintiffs as aforesaid, and with the same would proceed in said ship to &c., unless elsewhere ordered by the plaintiffs, and would render his reasonable account of the said cargo, and of the net proceeds thereof, to the plaintiffs upon demand. Now the plaintiffs aver, that

although the said T did proceed in said ship with said cargo, and with the same did arrive at &c., and afterwards arrived in said ship, at &c.; yet the said T, not regarding his promise aforesaid, but intending to injure and defraud the plaintiffs, did not ever deliver said cargo to said H, to be disposed of to the plaintiffs' best profit; nor did the said T ever lay out the net proceeds of said voyage in molasses, cotton, coffee, or such articles as would yield the plaintiffs the best profit as aforesaid; nor hath the said T ever rendered to the plaintiffs his reasonable account of the said cargo, or of the net proceeds thereof, though requested, to wit, at &c., on &c., and at divers other times there since; all which neglects and breaches of his, the said T's, promise, are to the damage &c. *Stevenson v. Coffin, Essex, 1781.*

T. PARSONS.

Owner v. Master, for neglecting to lay out proceeds of cargo, neglecting to account, &c.

FIRST COUNT. For that the said T, at &c., on &c., in consideration that the plaintiffs had then and there, at the request of said T, appointed him master of their ship, named &c., then lying in the harbor of said S, bound on a voyage to foreign parts beyond seas, and back, laden with the articles mentioned in the first schedule hereto annexed, which said articles are of the value of &c.; and in consideration of the sum of five per cent. commissions on the sales of the said outward bound cargo, and two and a half per cent. commissions on the net proceeds of said cargo, to be received by him out of the proceeds of said cargo; and in consideration of five per cent. commissions on the freight of such goods and merchandises as he should take on board at the island of G, in the W. I., to transport to E; and in consideration of the license and privilege of bringing so many goods and merchandise in said ship from the W. I. to S aforesaid, on his own account, as was usual and customary for masters of vessels in like cases, the said T then and there promised the plaintiffs, that he would embrace the first good wind and proceed to the island of G; and would use his own judgment in chasing or avoiding any vessels he might fall in with, and in case he should take any vessel on his passage outward, having fish and lumber, a cargo suitable for the W. I., that he would take her under his convoy to the W. I.; but if provisions, such as beet, pork, &c., that he would order it to S aforesaid, and on his arrival at G, that

he would sell the cargo to the plaintiffs' best advantage and lay out the net proceeds in good cotton, except about three thousand livres, of the value of &c., which sum he would reserve to purchase salt; and that after taking the cotton on board, he would take on board as much rum on freight, to transport to E, if he could get it, as he should judge best, taking care not to load too deep, and making the best terms he could for his freight; and, on his arrival at E, that he would purchase as much St. Martin's salt with the said livres and freight of the rum, as he should think best for the owners, and then proceed for home. Now the plaintiffs say that the said T proceeded on said voyage in said ship, with the cargo aforesaid on board, and arrived safe therewith at G aforesaid, and that he might there, to wit, at said S, have disposed of the net proceeds of his outward bound cargo for good cotton, and reserved the said three thousand livres, to purchase salt therewith at E, and might have taken on board at G, to carry to E on freight, a great quantity, to wit, sixty hogsheads of rum, without loading too deep; and might have purchased at E, with said livres and the freight aforesaid, and brought to S aforesaid, a great quantity, to wit, one thousand five hundred bushels of St. Martin's salt; yet the said T, in no wise regarding his promise aforesaid but intending to injure and defraud the plaintiffs, neglected and refused to lay out and dispose of his said cargo to the plaintiffs' best advantage, and also to purchase cotton at G, but laid out part of the said cargo in purchasing thirty-two hogsheads of rum then, and afterwards sold and disposed of a part of the cotton, to wit, five bags, containing one thousand five hundred pounds weight, at E for duck, and neglected and still neglects, to wit, at said S, to render to the plaintiffs an account of his proceedings in said voyage, and hath wasted and embezzled the said cargo, as also one thousand five hundred pounds weight of cotton, and has not in any respect performed his promises aforesaid.

SECOND COUNT. Also for that the said T, at &c., from &c., to &c., was the plaintiffs' bailiff and receiver, and within that time, had the care and administration of certain goods and merchandises, and money of the plaintiffs, other than is before mentioned, but enumerated in the second schedule hereto annexed, to merchandise and make profit thereof for the plaintiffs, and to render the plaintiffs a reasonable account thereof on demand, and, in consideration

thereof then and there promised the plaintiffs to do the same accordingly, and to render the plaintiffs a reasonable account thereof on demand; yet though requested, the said T hath not rendered any reasonable account thereof, but neglects so to do.

THIRD COUNT. And for that the said E, then and there, owing the plaintiffs another sum of &c., for so much money received by him to the plaintiffs' use, in consideration thereof then and there promised the plaintiffs to pay to them the same sum on demand; yet, though requested, the said E has not paid the same, but he denies it; to the damage, &c. *Buffington v. Tuttle, Essex, 1781. W. WETMORE.*

For not paying for goods, according to special contract to pay by instalments.

FIRST COUNT. For that the plaintiff, on &c. being possessed of a large quantity of hemp, of his own property, to wit, at S aforesaid, then and there sold and agreed to deliver said E, on demand, — tons thereof, and the said E, in consideration thereof, and that said plaintiff would deliver him, said E, said — tons of hemp, according to the plaintiff's said agreement, undertook and promised the plaintiff, that he would pay him for — tons, part of said — tons of hemp, after the rate of \$— per ton, amounting to the sum of \$— and for — tons, other part of said — tons of hemp, he would pay the plaintiff, at &c., after the rate of \$— per ton, amounting to \$—, both the aforesaid sums making together \$—, to be paid to the plaintiff as follows, to wit, one quarter part of said sum last mentioned, in three months after the delivery of said hemp to said E, with lawful interest for the whole of said sum, from the delivery of said hemp, until the payment of the first quarter part thereof should be made; one other quarter part of said sum last mentioned, in six months after the delivery of said hemp to said E, with lawful interest upon and for three quarters of said sum, from the delivery of said hemp, until the second quarterly payment thereof should be made to the plaintiff; one other quarter part of said sum last mentioned, in nine months after the delivery of said hemp to said E, with lawful interest for half of said sum, un'til said third quarterly payment thereof should be made to the plaintiff; and the remaining quarter part of said sum last mentioned, in twelve months after the delivery of said hemp, with lawful interest for said quarter of said sum, until the

same should be paid to the plaintiff; so as that the whole sum last aforesaid, should be paid in twelve months after the delivery of said hemp, and bear interest from the delivery thereof, until the whole of said sum should be paid. And the plaintiff avers, that pursuant to his said agreement, and relying upon the aforesaid promise and undertaking of said E, he delivered to him said — tons of hemp, on &c., and said — tons, on &c., and that more than twelve months have elapsed and expired, since the delivery of the whole of said hemp to said E was completed. Yet though often requested, the said E has not paid the plaintiff the said sum of \$—— according to his said agreement, nor hath said E paid the same to the plaintiff at all, but neglects so to do.

Quantum valebant, to be paid by instalments.

SECOND COUNT. And for that the said E, at S aforesaid, on the day of the purchase of this writ, in consideration that the plaintiff, at the request of said E, had sold and delivered him other — tons of hemp than are mentioned in the account annexed, but of the same quality therewith, upon credit, he, the said E, then and there, in consideration thereof promised the plaintiff, that he, the said E, would pay the plaintiff so much money as the hemp was reasonably worth at the time of the sale and delivery thereof, to be paid at the times and in manner following, to wit, one quarter part of the reasonable worth of said hemp last mentioned, in three months after the delivery thereof to the said E; one other quarter part of the reasonable worth of said hemp last mentioned, in six months after the delivery thereof to the said E; one other quarter part of the reasonable worth of said hemp last mentioned, in nine months after the delivery thereof to said E; and the remaining quarter part of the reasonable worth of said hemp last mentioned, in twelve months after the delivery thereof to the said E; and the plaintiff says, that said — tons of hemp were reasonably worth, at the time of the sale and delivery thereof, as aforesaid, the sum of \$——, whereof said E, thereafterwards, on the same day had notice; and the plaintiff also says, that — tons, part of said hemp, were delivered to the said E, on &c., and that the remaining — tons were delivered to the said E, on &c., and that more than twelve months have elapsed since the delivery of said — tons of hemp was completed. Yet the said E hath never paid the plaintiff the aforesaid sum of \$——, nor any part thereof; but neglects so to do. *Forrester v. Harradan, Essex, 1794. W. PRESCOTT.*

Against owner, for embezzlement of the master.

FIRST COUNT. For that whereas the said plaintiff, at &c., on &c., at the request of the said E, delivered to A, servant of the said E, and master of his schooner F, then bound to V, on the account and risque of the said E, — chairs, of the value of \$—, estimated at \$— each, and — large tables, at \$— each; amounting in value to \$—, being all of the value of \$—, to be carried to V, as said plaintiff's adventure, and there to be sold for the most and best advantage, and the proceeds of said wares to be laid out in the purchase of corn, to be returned to said plaintiff, paying customary freight and commissions for the same wares and for the said corn. And the said E, in consideration thereof, and of the said freight, to be paid as aforesaid, then and there undertook to, and promised the said plaintiff, that his said wares should be carried and sold as aforesaid, and that he should have a reasonable account of the same on demand; and that the return therefor should be made in corn as aforesaid; and the plaintiff avers, that his said wares, having been carried in the said schooner to V, as aforesaid, the said A, master of the said schooner, and servant of the said E, there embezzled the same, viz. at said M, on &c., and although the said schooner hath safely returned to said M, from the said voyage, and though often requested, and though said plaintiff hath always been ready to pay the said freight and commissions, neither the said E, nor the said A, has made any returns for the said wares, or rendered any account thereof.

For not investing proceeds of goods, nor rendering an account.

SECOND COUNT. And for that whereas the said plaintiff, at said M, on &c., at the request of the said E, delivered him — chairs, and — large tables, being other than aforementioned, and all of the value of \$—, and being of the goods of said plaintiff, said last mentioned chairs and tables to be carried in the said E's schooner N, as the adventure of the said plaintiff, and there to be sold for the most and best advantage, and the proceeds thereof to be laid out in corn to be brought and returned to the said plaintiff, said plaintiff paying customary freight and commissions; the said E, in consideration thereof, and of the said freight and commissions last mentioned, to be paid as aforesaid, then and there promised the said plaintiff to carry the said last mentioned chairs and tables to V, in the said schooner, and

there to sell the same to the most and best advantage, as aforesaid, and there to lay out the proceeds thereof in corn as aforesaid, to be brought and returned to the said plaintiff, and to render his, the said E's, reasonable account of the said last mentioned wares to the said plaintiff on demand; yet the said E never laid out the proceeds of the said last mentioned wares, and hath never made any returns therefor to the said plaintiff, or rendered him any reasonable account thereof, according to his said last mentioned promise, although often requested so to do; and although the said plaintiff hath been always ready to pay him, the said E, the last mentioned freight and commissions as aforesaid, but the said E hath neglected and still refuses and neglects so to do.

For not accounting, &c.

THIRD COUNT. And for that whereas the said E, at &c., on &c., was the bailiff and receiver for the said plaintiff, of — bushels of corn, of the value of \$—, of the goods of said plaintiff, being the proceeds of his certain other adventure sent in the said E's schooner N to I, and having so received the said — bushels of corn, the said E, then and there promised the plaintiff to render him a reasonable account thereof on demand; yet, though often &c.

Money had and received.

FOURTH COUNT. And for that whereas the said E, at &c., on &c., was indebted to the said plaintiff in the sum of &c., for a like sum, before that time received by the said E, to and for the use of the said plaintiff, in consideration thereof, the said E then and there promised the said M, to pay him that sum on demand; &c.

For not paying balance of account annexed.

FIFTH COUNT. And for that whereas the said E, at &c. on &c., was indebted to the said plaintiff in the sum of &c. being the balance of the annexed account, and according thereto, and in consideration thereof the said E then and there promised the said plaintiff, to pay him that sum on demand; yet the said E, though often requested, has not paid the same but refuses so to do.

SIXTH COUNT. And for that the said D, at &c., on &c., in consideration, that the said plaintiff, at the request of said

D, had sold and delivered him other wares, similar to those mentioned in the same account, then and there promised the said plaintiff to pay him therefor on demand, what the said wares last mentioned were reasonably worth, at the sale and delivery thereof as aforesaid; and the plaintiff avers, that the same were reasonably worth the sum of &c., of which said D then and there had notice; yet though often requested, he has not paid the said sum of &c., but refuses so to do; all which is to the damage, &c. *Marten v. Collyer, Essex, 1790.*
S. SEWALL.

On memorandum in writing of an agreement to transport goods and sell them on the plaintiff's account, &c.

FIRST COUNT. For that the said E, at &c., on &c., by his note or memorandum in writing of that date, under his hand, acknowledged he had received of the said plaintiffs, the goods and articles mentioned in the schedule hereto annexed, to carry to A, upon freight and commission, meaning thereby, that said plaintiffs were to pay him a reasonable and customary freight for carrying said articles from S to A, and also a reasonable and customary commission for selling the same, and there the same to sell for the plaintiffs' best advantage, provided he could sell the same for prices equal to those mentioned in the said schedule, the net proceeds thereof to lay out in purchasing flour, which said E, on his return, was to deliver to the plaintiffs at the first cost, meaning the price he gave for the same at A, the said plaintiffs paying him the freight home, meaning the reasonable and customary freight of flour from A to S, all which the said E then and there promised the plaintiffs to do accordingly, and that he would not sell any of said articles, mentioned in said schedule, under or for less prices than those affixed to them respectively in said schedule, and such of said articles as he should not sell at A, to return to the plaintiffs; and the plaintiffs aver that said articles did all arrive in safety at A aforesaid, and were there sold by said E. Yet though requested, at &c., on &c., and at divers times before and since that time, the said E hath never delivered to the plaintiffs the flour which he purchased with the net proceeds of said articles, nor returned them any of said articles or paid any money therefor, but neglects and refuses so to do.

SECOND COUNT. And for that whereas said T, at &c., on &c., had received of the plaintiffs the articles and goods mentioned in the schedule hereto annexed, at the value and

prices to them respectively affixed in said schedule, to carry and transport for them to A, in the state of V, the dangers of the seas excepted, and there to sell and dispose of the same for the most they would fetch, provided he could sell the same for as great prices as those mentioned in said schedule, but not to sell any of them for less but to return such articles to the plaintiffs as he could not then sell and dispose of for as great prices in cash as those mentioned in said schedule, he, the said T, to be paid by the plaintiffs a reasonable and customary freight for transporting said articles, and customary commissions for selling the same, and the proceeds and moneys arising from the sale of said articles to be laid out by said T, in purchasing flour, which he was to bring and transport to S, the dangers of the seas excepted, and there to deliver to the plaintiffs for the same price he should give for the same at A, they paying him a reasonable and customary price for the freight thereof from A to said S, and to render his reasonable account thereof to the plaintiffs; he, the said T, in consideration thereof, then and there promised the plaintiffs to carry and transport all such articles from S aforesaid to A, the dangers of the seas excepted, and there sell and dispose of the same for the most they would fetch, provided he could sell the same for as great price in money, as those to said articles in the said schedule respectively affixed, and the proceeds and moneys, arising from the sale of said articles, to lay out in purchasing good flour and the same to bring home to S aforesaid, the dangers of the seas excepted, and deliver to the plaintiffs at S, for the same prices he should give therefor in A aforesaid, they paying him freight therefor as aforesaid, and that he would not sell any of said articles, under or for less prices than those affixed to them in the schedule annexed, but would bring back and return to the plaintiffs such of said articles as he could not sell at said A, for as great prices respectively as those mentioned in said schedule, and would, on demand, render to the plaintiffs his reasonable account of his doings in the premises. Now the plaintiffs aver, that said T did arrive, with all said articles in safety, at said A, and did then sell the same for great prices, and hath since returned in safety to said S, and brought with him a great quantity of flour; yet, though thereto requested, viz. on &c. at said S, and at divers other times, before and since that time, by the plaintiffs, the said T hath not delivered them any flour on account of said articles, nor re-

turned them any of said articles, or paid them therefor, or ever rendered them any account, but neglects and refuses so to do.

THIRD COUNT. And for that the said D, at &c., on &c., owing the plaintiffs the sum of &c., for so much money, before that time by him had and received to the plaintiffs' use, then and there promised them to pay them the same sum on demand; yet, though requested, said D hath never paid said sum nor any part thereof, but neglects and refuses so to do, to the damage &c. *Symonds v. Very, Essex, 1790.*

W. PRESCOTT.

For not accounting for an adventure.

For that whereas the said plaintiff, at &c., on &c., delivered to the said D, a barrel containing one hundred pairs of women's cloth shoes, a box containing thirty-two pairs of men's shoes, and a bundle containing twenty-two yards and three quarters of striped jeannett, to be shipped by the said D, on board the schooner P, A, master, then bound for B, and the said D, then and there, in consideration thereof, promised the said plaintiff to sell the said shoes and jeannett, on said plaintiff's account, for the most they would fetch, agreeably to directions then and there received of him for that purpose, the dangers of the seas only excepted, and to render his, the said D's, reasonable account thereof accordingly on demand; and the said plaintiff avers, that the said D did sell the said one hundred pairs of women's shoes and the said thirty-two pairs of men's shoes, amounting in the whole to the sum of \$—, and has accounted with the said plaintiff for forty-five pairs of the said women's shoes, amounting to the sum of \$—, but for the remaining fifty-five pairs of said women's shoes, of the value of \$—, and the said thirty-two pairs of men's shoes, of the value of \$—, the said D, although requested, viz. on &c., at &c. hath never rendered his reasonable account, to the damage &c. *Sewall v. Bowler, Essex, 1788.*

S. SEWALL.

For not accounting for the profits of a ropewalk and a piece of land, &c. owned jointly by plaintiff and defendant, and for goods belonging solely to the plaintiff, &c.

FIRST COUNT. For that whereas the said D had been bailiff to the plaintiff of a piece or parcel of land, situate in S aforesaid, containing &c., and of a ropewalk and other buildings standing thereon, and of all the utensils and in-

struments commonly used in carrying on the ropemaking business, the principal part whereof in number and value are mentioned in the schedule hereto annexed, marked (No. 2) from &c., to the day of the purchase of this writ, the said land, ropewalk, other buildings, utensils, instruments and tools, being owned by the plaintiff and said D jointly, the plaintiff owning one undivided third part thereof, and the said D owning the other two third parts thereof, and for all that time had the care and management thereof, and carried on the ropemaking business therein, and received the whole issues and profits thereof, for the benefit and profit of the plaintiff and the said D, in the proportions and shares aforesaid, and to render a reasonable account thereof to the plaintiff on demand; and from the several times mentioned in the account annexed hereto, marked (No. 1,) to the day of the purchase of this writ, had been bailiff and receiver of the said plaintiff of the several goods, wares and merchandises, and sums of money, mentioned in said account last mentioned, and during those times, had the care and management of said goods, wares and merchandise, and moneys of the said plaintiff, to manufacture and make of said hemp and tar, cordage, and the same to sell and dispose of, and the proceeds thereof, together with the aforesaid sums of money, to apply to, and use in conducting and carrying on said ropemaking business, for a reasonable allowance to be made the said D therefor, for the sole benefit and profit of the plaintiff, and to render him a reasonable account thereof on demand; he, the said D, in consideration of the premises, on &c., at &c., promised the plaintiff to render him his, the said D's, reasonable account on demand, of the issues and profits of said land, ropewalk, instruments, utensils, and tools, and of the business of ropemaking, carried on in said ropewalk with the aforesaid instruments, tools and utensils, for their joint benefit as aforesaid, and also of said goods, wares and merchandises, and moneys, his care and management thereof, and the profits he should make or had made of the same, for the plaintiff; yet, though requested, to wit, at S aforesaid, on &c., the said D hath never rendered to the plaintiff his (D's) reasonable account thereof as aforesaid, but neglects so to do.

SECOND COUNT. And for that whereas the said T, at &c. was bailiff to the plaintiff of one undivided third part of about — acres of land, situate in said S, and of the

ropewalk and other buildings, standing and being upon the same, and of the instruments, tools and utensils commonly used in carrying on the ropemaking business, and which are enumerated and set down in the schedule hereto annexed, marked No. 1, the said one third part of said land and ropewalk, being of the value of \$—, and the said one third part of said instruments, tools and utensils, being of the value of \$—, from &c. to the day of the purchase of this writ, to use, occupy, and employ the same in carrying on the business of ropemaking in said ropewalk for the best advantage and profit of the plaintiff, for a reasonable allowance to be made to the said T, for his trouble and services, by the plaintiff, and during that time, had the care and management of said one third part of said land and ropewalk, and of the said buildings, instruments, tools and utensils, and had, in fact, during the time last aforesaid, occupied, used, and employed his, the plaintiff's, said one third part thereof, in carrying on the ropemaking business, and had received the issues and profits thereof during that time last aforesaid, the said T in consideration of the premises, on &c., at &c., promised the plaintiff that he would, on demand, render to him, the said T's reasonable account in the premises, and pay him thereupon, all such sums of money as should be due to him; yet, though requested thereto, viz. the day and year last mentioned, at S aforesaid, the said T hath never rendered to the plaintiff any account of the issues and profits of the plaintiff's said share of said ropewalk, utensils, instruments and tools, or of the business carried on in said ropewalk, or any account whatever respecting the premises, and hath never paid him the moneys due to him according to his said promises, but neglects and refuses so to do.

THIRD COUNT. And for that whereas the said T, at said S, was bailiff to the plaintiff, from &c., to the day of the purchase of this writ, of &c. tons of hemp, of the value of &c., and of &c., tons of hemp of the value of \$—, from &c., to the day of the purchase of this writ, to make and manufacture into cordage for the plaintiff, and the same to dispose of to the best advantage and profits of the plaintiff, and, during that time, received \$— of the plaintiff's money, to use and make profit thereof for the plaintiff, and of his doings with said hemp and money, to render his reasonable account to the plaintiff on demand; and in consideration of

the premises, the said T there, on &c. promised the plaintiff to do the same accordingly; yet the said T, though thereto often requested by the plaintiff, to wit, at S aforesaid, on the day of the purchase of this writ, and on divers days and times before this day, hath never rendered to the plaintiff his reasonable account of said hemp or moneys, or of the profits he made of the same &c.

For selling plaintiff's mares for less than plaintiff directed.

For that whereas, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the said T; had delivered to the said T, one black mare and one chesnut mare of the plaintiff, to be sold by the said T for the plaintiff, at certain prices, then and there agreed upon by them, *viz.* the said black mare at the sum of \$—, and the said chesnut mare, at the sum of \$—, and otherwise to be redelivered to the plaintiff, by the said T, for a reasonable reward, to be paid therefor, by the said plaintiff to the said T, he, the said T, undertook and faithfully promised the plaintiff, that he, the said T, would sell the said two mares for the plaintiff, at the respective prices aforesaid, and at no less price or prices whatsoever, or would otherwise safely redeliver the same mares to the plaintiff, when thereunto requested; and although the said T, then and there received the said mares from the plaintiff, for the purpose aforesaid, yet the said T, not regarding, &c. did not sell the said mares, or either of them, for the plaintiff, at the respective prices aforesaid, or redeliver the said mares, or either of them to the plaintiff, although thereto requested by the said plaintiff, *(if thought necessary to allege a special request, say, viz. on &c., at &c.)* but the said T afterwards, *viz.* on &c., at &c., did sell the said two mares, at and for less prices than those agreed on as aforesaid; *viz.* the said black mare for the sum of \$—, and the said chesnut mare for the sum of \$—, contrary to his said promise and undertaking.

Against a broker for selling plaintiff's indigo on credit, which he was directed to sell for ready money only.

For that whereas, on &c., at &c., in consideration that the plaintiff, at the request of the said T, then and there being a broker, had employed the said T to sell a large quantity of indigo of the said plaintiff's, for the said plaintiff, for ready money, and had promised the said T to pay him a reasonable commission for the same, he, the said T, undertook and promised the plaintiff, to sell the same according-

ly; and the plaintiff in fact saith, that, although the said T did sell and dispose of the whole of the said indigo, and did sell part of the same, *viz.* — weight, for ready money, according to his said promise and undertaking; yet the said T, not farther regarding his said promise, but fraudulently &c., did not sell the residue of the said indigo for ready money, but on the contrary did sell the same to one A B, on credit; and the said A B, and the said T, though requested, have never paid the said plaintiff for the same indigo, but &c.

For breach of a promise of marriage, brought by a woman.

For that whereas the said T, on &c., at &c., being then sole and unmarried, in consideration that the plaintiff (then also sole and unmarried,) at the special instance and request of the said T, had then and there agreed and promised the said T, that she would marry and take to husband the said T, when thereunto requested, he, the said T, then and there faithfully promised the said plaintiff, that he would marry and take her to wife, when thereunto requested; and although the said plaintiff, confiding in the aforesaid promise of the said T, hath always from thence hitherto refused to marry or contract matrimony with any other man whatsoever, and still remains sole and unmarried, and always, from the time of making the said promise, was ready and willing and offered to marry and take to husband the said T, *viz.* on &c., at &c., yet the said T, not regarding his said promise, but contriving &c., hath not yet married or taken to his wife the plaintiff, [but &c.] (*If so, add*) and afterwards, *viz.* on &c. at &c., married and took to his wife another woman, *viz.* one C D, contrary to his promise aforesaid.

NOTE. In general, it seems, where the defendant has not married another, the plaintiff should allege and prove a tender and refusal of marriage. But if a man tells a lady's father, that he does not intend to perform his matrimonial engagement to his daughter, it is sufficient for her to maintain her action. See *Gough v. Farr*, 2 Car. & Payne, 631.

If after an engagement to marry, and the lapse of a reasonable and proper time, or the time agreed between the parties, the gentleman omits to offer to marry, it is generally considered a refusal to marry. In the case of *Seymour v. Gartside*, 2 Dowl. & Ry. 55, the Court remark, that it can hardly be expected, that a lady should say to a gentleman, *I am ready to marry you, pray marry me.* Yet it will be proper for the lady to appoint a time and place for the marriage, and give the gentleman notice of it.

If the promise is to marry within a given time, or otherwise varies from a promise to marry generally, there should be counts on the exact

promise, in addition to the usual counts. But, it seems, notwithstanding a precise promise is proved, varying from a precise promise, as set forth in the declaration, if the declaration contain also a count on a promise to marry within a reasonable time, the jury will be at liberty to presume such general promise to marry, from all the circumstances; such general promise to marry within a reasonable time, not being at all inconsistent with a promise to marry at a set time. See 1 Stark. 82.

As an action for a breach of promise of marriage may fail for want of proof, the promise being made in private, it may not be amiss to remark, that a bill in equity will lie for a discovery of a promise of marriage, in aid of an action of Assumpsit. Forrest's Rep. 42. See further on the subject of marriage promises, Law Summary, 79.

For breach of promise of marriage brought by plaintiff against husband and wife, for her breach of promise of marriage.

For that whereas, on &c., at &c., in consideration that the plaintiff, being then and there sole and unmarried, at the special instance and request of her, the said E, then also sole and unmarried, had then and there promised to marry and take to wife the said E, she, the said E, then and there promised the said plaintiff, to marry and take to husband him, the said plaintiff; and although the plaintiff, confiding in the said promise of the said E, hath always from thence hitherto, refused to contract marriage with any other woman whatsoever, and remains sole and unmarried; and, from the time of making the said promise, whilst the said E remained unmarried, was ready and willing to marry the said E, and often requested the said E to marry and take to husband the said plaintiff, viz. on &c., at &c., yet the said E, not regarding &c., hath not yet taken the said plaintiff to husband, but hath hitherto refused so to do, and, after the making of the said promise, viz. on &c. at &c., married and took to husband the said J D, in violation of her said promise so made as aforesaid.

For not paying plaintiff his wife's marriage portion, which defendant promised to pay on the marriage.

For that whereas, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the said E, would marry with and take to wife, Sarah, the daughter of the said E, he, the said E, then and there promised the plaintiff, to give and to pay to him, as a marriage portion with the said Sarah, the sum of \$—, when thereto requested, and the plaintiff avers, that, confiding in the promise of the said E, he, the said plaintiff, afterwards, viz. on &c., at &c., took to his wife, and intermarried with the said Sarah, daughter of the said E; whereof the said E, then and there

had notice ; by reason whereof the said E became liable to pay and ought to have paid unto the said plaintiff the said sum of \$—, when requested &c.; yet, though often requested, viz. on &c., at &c.

Is it necessary to allege a special request ?

On a special promise to keep a chariot in repair one year ; made at the time of sale.

For that whereas on &c., at &c., in consideration that the plaintiff, at the request of the said E, had bought of the said E a certain chariot, at the price of \$—, he, the said E, then and there undertook and promised the plaintiff, to repair the said chariot and keep the same in good and sufficient repair, at his own proper costs, as often as occasion should require, for the space of one year, then next following ; and the plaintiff says, that although the said chariot, afterwards, viz. on &c., and on divers other days and times, between that day and the expiration of that year, was in great decay for want of repairs, viz. on &c., at &c., whereof the said E, from time to time, had notice from the plaintiff, viz. on &c., at &c., and often afterwards, yet the said E, though often requested, (viz. on &c., at &c., and at divers other places and times,) hath not repaired the said chariot, or kept the same in good and sufficient repair, at his own proper costs, but hath wholly refused and still refuses so to do.

For hindering tenant from taking possession according to a parol lease.

For that, on &c., at &c., a certain discourse was moved and had between the said E and the said I, [defendant] of and concerning a certain messuage and garden with the appurtenances, situate, &c. upon which discourse it was then and there agreed between the said E and the said I, that the said I should suffer and permit the said E to use, enjoy, and have the possession of the said messuage, &c. for one whole year, then next ensuing, and that the said E should pay to the said I, for the same, the sum of \$—; and the said I, then and there, in consideration that the said E, at the special request of the said I, promised to pay him the said sum of \$—, then and there promised to perform and fulfil all and singular the agreement aforesaid, on his part to be performed and fulfilled.

SECOND COUNT. And whereas, on &c., at &c., the said I had demised and to farm let to the said E, one other mes-

suage &c., in &c., to hold from, &c., for one whole year then next ensuing, the said I thereupon and in consideration that the said E, at the special request of the said I, then and there paid him the sum of \$—, then and there faithfully promised the said E to permit her to enter in and upon the messuage &c. on &c., aforesaid, and thence for one whole year to have the use and possession thereof, according to the tenor of the demise aforesaid; and the said E avers, that she has fulfilled and performed all and singular the articles in the several agreements aforesaid, on her part to be performed; yet the said I, not minding his several promises aforesaid, but intending to deceive and defraud the said E, hath not suffered the said E to use, occupy, or have possession of the messuage &c., first above mentioned, or to enter into and have possession of the messuage &c., last above mentioned, but hath wholly refused the said E to enter into and have the use and possession of the same, and hath kept the possession of them from &c., to &c., to the damage, &c. 1 *In. Cler.* 400.

Part owner of a vessel v. part owner, for one half of the sum paid a sailor for wages.

For that whereas the said A and B were owners together in equal parts of the ship, called &c, from &c., to &c., within which time the said A and B became indebted to one C, in the sum of \$—, wages for his, the said C's, service as a sailor on board said ship, on a voyage within said time, made by her from &c., to &c., and back, for which the said A and B were to the said C, in equal half parts, indebted &c.; and afterwards, to wit, on &c., at &c., the said A paid to the said C the whole sum aforesaid, in discharge of the said wages &c., and \$—, for charges thereon, being \$— in the whole. And afterwards, to wit, on &c., at &c., the said A notified the said B thereof, who thereon became chargeable to pay the same half part of the said sum, being \$—, and then and there promised accordingly to pay the same to him on demand; yet, &c. BOURNE.

Captain v. consignee of goods for freight.

For that the said A, at &c., on &c., in consideration that the said B had, at his request, carried and transported for him, the said A, certain merchandises, viz. — bales of drapery, with patterns, in a certain vessel, called, &c., from Hull, in the Island of G. B., to &c., and had there delivered

the same to the said A, then and there promised the said B to pay him therefor, on demand, as freight therefor, at the rate of £— sterling money, for every cubic foot the said bales should measure, with five per cent. primage. Now the plaintiff avers, that the said bales measured — cubic feet, and that the freight aforesaid, at the rate aforesaid, amounted to £—, sterling money, equal to \$—, and the said primage amounted to \$—, whereof the said A then and there had notice; yet &c. PARSONS.

On a bargain respecting the sale of land.

For that the said E [defendant,] being seized in fee of two pieces of land, the one situate in &c., the other in &c., a discourse arose between the plaintiff and him of the number of acres, price, and sale of said pieces of land &c., to the plaintiff; and thereupon it was agreed between them, that the said E should, by a legal deed, convey the said pieces of land to the plaintiff, to hold to him and his heirs, he securing payment to the said E therefor, at the rate of \$— an acre, and the said E affirmed to the plaintiff that said pieces of land contained — acres, and thereby induced the plaintiff to accept of such a deed therefor from the said E, and to secure to the said E the payment of \$— therefor, at the rate aforesaid; and the said E, on &c., at &c., in consideration that the plaintiff, at the request of the said E, accepted such a deed from him of said land, and had secured to him the same sum, promised the plaintiff, that if said — pieces of land, upon due measure thereof afterwards to be made by a surveyor, should be found wanting of — acres, that then the said E would pay to the plaintiff, at the rate aforesaid, for any quantity so found wanting; and the plaintiff says, the said E, on &c., at &c., had due notice to be present, and said pieces of land were measured by a surveyor, and thereupon — acres were found wanting of the said — acres, whereof the said E, on &c., at &c., had notice, and was requested by the plaintiff to pay him at the rate aforesaid, for said — acres, amounting to \$—; yet he hath not paid said sum, &c. *Cl. Instr.*

For attorney's fees and costs paid as indorser of the writ.

For that the said C, on &c., at &c., applied to the plaintiff and falsely affirmed, that he was attorney to one E, and by him directed to sue one F in the said E's name, and

upon a demand of the said E against the said F, and promised the plaintiff, that if he, the now plaintiff, would make out a writ in the name of the said E, against the said F, on the same demand, and cause the same to be prosecuted through the then next C. C. P. for the county of &c., and make the disbursements necessary for the same, that he, the said C, would pay him therefor, as much as his, said A's, fees, trouble, and expenses therein were reasonably worth; and then and there further promised the said A, that if he would indorse said writ, that he, the said C, would indemnify him from all demands on account of so doing; and the said A thereupon, confiding in the said C's affirmation and promises aforesaid, made out and indorsed a writ as aforesaid, in manner aforesaid, and prosecuted the said suit through the C. C. P. then next ensuing, for the county of &c. aforesaid, and made the disbursements necessary therein. And the said A in fact saith, that his fees, trouble, and disbursements, in the suit aforesaid, were reasonably worth \$—, of all which the said C, on &c., at &c., had notice; yet he has not paid the same, though requested, but refuses to do it. And the said A further in fact says, that the said C hath not indemnified him on account of indorsing said writ, but failed further to prosecute said action in the S. J. C. next ensuing said C. C. P., last mentioned, and suffered judgment to be rendered in favor of said F, for \$— upon his, said C's, failure, there to prosecute said suit; and there was no where to be found, any such person as the said E; neither did any such person ever give any such power or orders to the said C, to prosecute any suit; so that, by reason thereof, the said A, by law became obliged to pay \$—, costs of suit; and accordingly, on &c., paid the same to said F; yet, &c. *Pratt v. Very, 1753, and Imp. 315.*

On a parol agreement and special damages.

For that whereas the said B [defendant,] on &c., at &c., had agreed with the said A to buy of him all such hides and skins, of all and singular the oxen, heifers, cows and calves, of said A, which he should, from and after the said — of &c., until &c., then next following, happen to kill and slay; he, the said B, in consideration thereof, and of \$—, to him in hand paid by the said A, promised then and there, that he would, on the day last mentioned, pay him for every hide and skin, of each and every such ox &c, so killed and slain by the said A, within the time aforesaid, and within the

same delivered to said B, the sum of \$—; by reason of which said promise of the said B, he, the said A, did, within the time aforesaid, kill and slay ten oxen, ten cows, ten heifers, and ten calves, and at divers times and days within the same time delivered to the said B, all and singular the hides and skins of said oxen &c., so killed and slain according to the form of the bargain and agreement aforesaid, to wit, at &c, aforesaid, the true value of all which said hides and skins so delivered to the said B by the said A, does in the whole, amount to \$—; and the said A, trusting to the aforesaid promise of the said B, and that the sum of \$— would have been paid to him by the said B, according to the bargain and agreement aforesaid, had undertaken and promised to one C, and divers other persons to whom the said A was then indebted, in the like sum, to pay them their respective debts; yet the said B being not ignorant of the premises, and well knowing the said A to have promised the payment of said sum of \$—, unto said C, and to such other persons to whom he stood indebted as aforesaid, and contriving to defraud and deceive the said A in this particular, hath not paid the same sum of \$—, nor any part thereof to said A, though requested, but he still refuses to pay it; by reason whereof, said A hath not been able to keep his said promise and day of payment with the said C, and others to whom he stood indebted as aforesaid; insomuch that he, the said A, by reason thereof, is very much hurt in his good name, credit, and reputation, and also very much prejudiced and hurt in his trade and business, and dealings with the said C and other honest tradesmen, and likewise put to great trouble and expense, in defending divers actions and suits, commenced and prosecuted against the said A, for not performing his contracts, occasioned by said B's not performing his contracts and bargains, so made with the said A, as aforesaid; to the damage, &c.

For money paid by plaintiff to discharge defendant's debt, at his request.

For that whereas the said H C, on &c., at &c., had, at the special instance and request of the said O B, [defendant] and for his proper debt, paid to one E P, the sum of \$—, which the said O then and there owed the said E, and ought before that time to have paid, he, the said O, in consideration thereof, then and there promised the said H to pay him that sum on demand; yet the said O, thereafterwards, though requested on the same day, hath not, &c.

F. DANA.

Against a sailor for leaving a ship after advance money paid.

For that said A [defendant,] at &c., on &c., shipped himself as a common seaman on board the said B's ship, called the &c., to proceed in her on a voyage from said &c., to &c.; in consideration whereof, the said B then and there paid the said A, the sum of \$— for advance wages, and thereupon the said A then and there promised the said B to proceed on said voyage, on board said ship, in such capacity as aforesaid. Now the said B, in fact says, that the said vessel proceeded in the voyage aforesaid, and the said A, not regarding his promise aforesaid, but contriving to deceive and defraud the said B of the said sum, and also to injure the said B in the voyage aforementioned, unlawfully deserted and left said vessel, and did not proceed in her according to his said promise, whereby the said B was put to great trouble and expense in procuring another person to proceed in the said voyage in her, in his, the said A's, stead, &c.; to the damage, &c.

On special contract to pay one half in money, and the other half in goods.

For that the said A [defendant,] at &c., on &c., owing the plaintiff \$— for &c. days' work, done for the said A, at his request, by the said B, at his trade aforesaid, on board the said A's brig, between that day and the — day of &c., promised the plaintiff to pay him that sum, the half thereof in lawful money, and the other half thereof in goods, on demand; yet the said A hath not paid the said sum, in manner aforesaid, or any otherwise, though requested to do it, on &c., at &c., and oftentimes since, but still neglects it, &c.

R. DANA.

For not conveying land according to promise in writing.

For that the said A [defendant,] on &c., at &c., by a certain note and memorandum in writing, under his hand, agreed with the said B to sell him — acres of land, bounded &c., and in the tenure and occupation of one D, for the sum of \$—, and the said A then and there received of said B, \$—, in part payment, and then and there promised the said B, that, upon payment of \$—, being the residue of the sum of \$—, he, the said A, would convey the said — acres of land to him, the said B. Now the plaintiff in fact saith, that, on &c., at &c., he tendered the said sum of \$—, to the said A, and then and there requested him that he would convey the said — acres of land to him;

the said B ; yet the said A did not, and yet hath not conveyed the said — acres of land to the plaintiff, though often since requested, but wholly neglects and refuses so to do. READ.

Master of a coasting sloop v. owner for customary wages.

For that whereas the said A, at &c., on &c., appointed the plaintiff master of the said A's coasting sloop, called &c., directing him to employ her in coasting backwards and forwards, to and from several parts of this commonwealth, to the best advantage of the said A ; and for the plaintiff's service in managing said vessel, the said A then and there promised him to allow him, for and during such time, as the plaintiff should continue master of the said vessel, such share of the earnings of said vessel, as is customarily allowed to masters of such coasting vessels, which the plaintiff avers to be one third part. Now the plaintiff in fact says, that from &c., to &c., he employed the said vessel in coasting to and from several parts of this commonwealth, during which time she earned the sum of \$—, which sum the said A received from sundry persons for freight of their goods carried in said vessel during the time aforesaid ; in consideration whereof, the said A, on the same day, at &c., promised the plaintiff to allow and pay him the sum of \$—, being one third part of what the said A received as the earnings of said vessel, in manner aforesaid, &c. ; yet, &c. BOLLON.

On a special promise that the defendant would not appeal from a judgment, but abide by and pay the same.

For that the said F, at a court held before S W, Esq. on &c., at &c. by the consideration of said Justice, recovered judgment against said C [defendant,] for \$—, damages and costs of court, as by the record thereof, with the said Justice remaining, appears ; from which judgment the said C then and there appealed to the then next C. C. P., &c., and recognized to prosecute said appeal with effect ; and afterwards, to wit, on &c., at &c., upon a discourse, then and there held between the said C and F, of and concerning said judgment, and of and concerning said appeal thereon, it was mutually agreed between them that said C should not prosecute said appeal, but should pay said F the sum of \$— and costs of that suit, and that said F should not enter any complaint against said C, at said C. C. P., for not prosecuting said appeal ; and in consideration of said agreement,

and of said F's promise, then and there made to said C, not to enter such complaint, the said C then and there promised said F, that he would not prosecute said appeal, and that he would pay said F the sum of \$— and also his legal costs of said suit, on demand; and the plaintiff avers, that the legal costs of said action were taxed by said Justice, and amounted to \$—, whereof the said C, afterwards, to wit, on &c., at &c., had notice, and was requested to pay the same \$— and said costs; and the plaintiff avers, that he did not enter such complaint at said C. C. P.; yet, though requested, the said C has never paid said sums but neglects it, &c.

BRADBURY.

Against the inhabitants of a town, on their committee's contract to build a school-house, &c.

In a plea of the case; for that one G D and J A, at said Salem, on &c., being a committee of the said inhabitants for building a middle school-house in said S, and being duly authorised by said inhabitants, for that purpose and in their behalf, to contract for materials and labor suitable for building the same, and to draw orders on the treasurer of said inhabitants for payment of the same; the said G and A, a committee as aforesaid, authorised as aforesaid, then and there, in consideration that the plaintiff at their request, had sold and delivered to them, for the use of the said inhabitants, the frame for the middle school-house in said S, and raised the same, of the value, so raised, of \$—, by their, the said G and J's order, in writing of that date, by them signed, did direct R M, Esq., then and there treasurer of the said inhabitants, and yet their treasurer, to pay the plaintiff on demand, the sum of \$— of the moneys of the said inhabitants, for the said frame and raising the same, which order the plaintiff thereafterward, on &c., presented to the said treasurer and requested payment thereof; and the said treasurer hath neglected and still neglects and refuses to pay the same; by reason of all which, and of law, the said inhabitants became liable; and thereafterwards, on the same day, in consideration thereof, promised the plaintiff to pay him the same sum of \$— on demand; yet, though requested, the said inhabitants have never paid the same sum nor any part thereof, &c.

DANE.

On an agreement to exchange horses, earnest having been paid.

For that, at &c., on &c., it was agreed between the

plaintiff and the said D [defendant,] that the plaintiff should give the said D a colt in exchange for his mare, and should pay him \$— to boot, on &c., and that it was further agreed there, on said day, between the plaintiff and said D, that the plaintiff should keep the said colt until &c.; and the said D, then and there agreed to give his said mare to the plaintiff, on &c.; and the said D, to make the agreement the more firm and binding, paid to the plaintiff \$— in earnest of the bargain, and the plaintiff kept the said colt until —; and the plaintiff then, on said &c., did offer to pay the said D, the said \$—, and requested him to accept the same, and then and there requested the said D to deliver to the plaintiff, his, the said D's, said mare, which he then and there refused, and ever since hath refused to do; to the damage, &c. 5 Term Rep. 409.

Town treasurer v. constable, for not collecting a tax.

For that whereas the said E, on &c., at &c., then being one of the constables of the town of A aforesaid, received of the assessors for the said town of A, a certain rate-bill upon several of the inhabitants of A aforesaid, of them to levy and raise the sum of \$—, part of the town rate of A aforesaid, with a warrant sufficiently empowering him to distrain for the same, and to pay the same to the treasurer of said town of A, on or before —; whereupon the said E did then and there promise to collect and pay the same accordingly; yet, &c.

For privilege or freight money by mariner.

FIRST COUNT. For that whereas on &c., at &c., the said A and B [defendants] were owners of a certain ship called &c., and it was then and there agreed, by and between them and the plaintiff, that he should do the service of a faithful mariner on board said ship, in the capacity of chief mate, in a voyage from &c., to &c., and thence to &c., and that the plaintiff, besides the customary stipulated wages should have allowed him — tons, privilege in said ship; and if the plaintiff should not occupy the said privilege, and the said ship should be fully freighted and loaded in that part of the voyage aforesaid, from &c., to &c., that then the said A and B should pay the plaintiff for said privilege, so much as the said privilege was reasonably worth. And, thereupon, in consideration that the plaintiff, at the special instance and request of said A and B, then and there faith-

fully promised to perform all the said agreement, on his part to be performed, the said A and B then and there promised the plaintiff, to perform all said agreement, on their part to be performed. And the plaintiff avers, that giving credit to the last mentioned promise of said A and B, he went the said voyage; that he performed the service of a faithful mariner on board said ship, in the capacity of chief mate; that he did not occupy his privilege aforesaid, in said ship, in the part of the voyage from &c. to &c., or any part thereof; and that the said ship was fully loaded and freighted by or for the account or benefit of said A and B, in the said part of the voyage aforesaid, viz. from &c., to &c.; whereby the said A and B became liable to pay the plaintiff so much money as the privilege aforesaid was reasonably worth on demand; which the plaintiff avers to be the sum of \$—, whereof the said A and B thereafterwards, at &c., had notice.

SECOND COUNT. And also, for that whereas the plaintiff, on &c., at &c., at the special instance and request of said A and B, had permitted them to load and freight — tons on board a certain other ship, called &c., in and on account of the privilege, as it is called, which belonged to the plaintiff, of — tons on board said other ship &c., from &c., to &c., which privilege they occupied, and loaded and freighted accordingly; the said A and B, then and there promised the plaintiff to pay him on demand therefor, so much as he reasonably deserved, which the plaintiff avers to be the sum of &c.

PUTNAM.

Add " Money had and received."

Part owners v. master [part owner] for breach of orders.

In a plea of the case, for that whereas the plaintiffs and the said E [defendant] were, on &c., at &c., joint owners of the brig, called &c., and her cargo and goods on board, which are enumerated in the schedule annexed, in the following proportion, viz. &c., &c.; and the brig so laden, and then lying at &c., bound on a voyage to &c., beyond seas, with said cargo was of the value of \$—; and the plaintiffs, being the major part of said owners, in number and value, according to the custom of merchants, and at the request of said E, appointed him, the said E, master of the said brig, for the said intended voyage, and then and there promised to allow and pay him, the said E, at the rate of \$—, for

master's wages, monthly, during said voyage, and also \$— per cent. for commissions on the sale and disposal of said cargo, and for the purchase of other cargo, according to the orders hereinafter mentioned ; in consideration thereof, the said E then and there promised the plaintiffs, that he would immediately proceed, &c. [*so recite the substance of the orders.*] Now the plaintiffs aver, that the said E, having taken the charge of said brig and cargo, as master aforesaid, afterwards on &c., proceeded from &c. on the voyage aforesaid, and on &c., arrived at &c., with the same cargo, and with the net proceeds thereof could have easily purchased a cargo, &c. [*as in the orders :*] yet the said E, not minding his promises aforesaid, but contriving to deceive and defraud the plaintiff, did not purchase a cargo &c., but refused and neglected so to do &c., [*state the particular breaches*] and though often requested, has not rendered the plaintiffs any account of his proceedings in said voyage, though said voyage is long since ended, and still refuses and neglects so to do.

Add a count as on a promise by bailiff, &c.

Against administrator on a joint note of intestate and plaintiff paid by plaintiff.

For that the said A [plaintiff,] and said I, [intestate,] at &c., on &c., being jointly indebted to one C, in the sum of \$—, to secure the payment of said sum, gave a promissory note to said C, of that date ; by which they promised jointly and severally to pay said C, that sum in——months from that date, with interest therefor until paid. And afterwards, on &c., at &c., said note being due and unpaid, said A was requested by said C to pay her the whole of said sum and the interest until that time, which the said A, then and there did, the interest and principal amounting to \$—, of which the said I, thereafterwards on the same day had notice, and thereby became liable to and in consideration of the premises, then and there promised the plaintiff to pay him one half of the principal and interest, to wit the sum of \$— on demand ; yet the said I, though often requested, to wit, on &c., at &c., never paid the sum in his lifetime, nor hath the said D [defendant] paid the same, though alike requested, since his death, &c.

PARSONS.

On a promise by note to repair a wharf, &c.

In a plea of the case, for that the said A [defendant] on

&c., at &c., agreed with the plaintiff, that he, the said A, would repair, ballast and mud the plaintiff's wharf, situate in &c., lying between &c., for the sum of \$—, to be paid him by the plaintiff therefor, and that the said A, in consideration that the plaintiff had disbursed for, and paid him \$— in part and promised to pay him, the said A, other \$—, in full of the said \$—, when he should have finished the aforesaid mudding, repairing, and ballasting the wharf of the plaintiff, then and there promised the plaintiff well and faithfully to repair, mud and ballast said wharf of the plaintiff, according to his agreement aforesaid, on demand; yet though requested, *viz.*, on &c., at &c., &c.

Against executor, on a special agreement of testator.

• In a plea of the case, for that in the lifetime of said C, *viz.* on &c., at &c., a certain discourse was moved and had between the plaintiff and said C, of and concerning the plaintiff's removing from off the farm of his late father, in &c., where the plaintiff then lived, and selling his own land adjoining thereto, and also his right in his said father's real estate, and of his, the plaintiff's, living with said C, until the plaintiff by the help and assistance of said C, could purchase some other place; and the said C, then and there promised the plaintiff, that if he would remove quietly from his said father's farm, he, the said C, would give him, the plaintiff, \$— towards purchasing some other place, and help him, the plaintiff, otherwise. Now the plaintiff in fact says, that he, relying on the said promise of the said C, did remove off from his said father's farm, sell his own land adjoining thereto, being &c., and also all his right in his said late father's estate, and lived with the said C, for the space of one year; yet the said C, wickedly contriving to defraud and injure the plaintiff, though requested, never gave the said A the said sum of \$— towards purchasing some other place, nor otherwise helped him, but utterly refused to do either; nor since his death, &c. R. DANA.

Part owner v. part owner, for repairs of a saw-mill.

For that from &c., to &c., the plaintiff hath been owner and occupier of an undivided moiety of a saw-mill, called &c., in &c., the other moiety thereof belonging to the said A, [defendant,] and one D, *viz.* to each an undivided one fourth part; and the plaintiff and the said A and D, having hitherto received the profits of said mill, and improved it according to their respective interests therein, were, and by law

are bound to repair and keep up the same and the utensils thereof; and whereas the said mill and utensils, on &c., fell to decay and wanted repairs, mentioned in the schedule annexed hereto, and the plaintiff, on &c., at &c., gave notice thereof to the said A and D, and required their aid and assistance, in proportion to their respective interests aforesaid, for repairing said mill and utensils, but they refused it; whereupon the plaintiff caused said mill and utensils to be repaired, and therein used the materials and did the labor mentioned in said schedule, all being necessary, and amounting to \$—, and thereof, on &c., at &c., gave notice to the said A and D; and the said B thereupon became liable to pay the plaintiff one fourth part of said sum, being \$—; and being so liable, in consideration, &c. *Co. Lit.* 54, 200; 2 *Ld. Raym.* 1093; *F. N. B.* 127, 295.

For money due on settlement by judge of probate of the real estate, on one heir, against husband and wife.

For that L B, late of S aforesaid, was, in his lifetime, seized in his demesne, as of fee, of certain lands and tenements situate in S, aforesaid, and on &c., there died so seized thereof, and intestate, leaving several co-heirs, viz. T. C., A. C., S. C., M. C., [plaintiff] and P. C. [one defendant] his heirs, to whom the said estate descended in this form, namely, to the said T two-sixth parts thereof, and to the said A, S, M, and P, one sixth part thereof, each; and afterwards, and before there was any settlement or distribution of the said estate, made by the Judge of Probate of Wills and granting administration in and for the said county of E, and before the same A came of age or was married, he, on &c., at &c., died seized in fee of his said undivided sixth part of the real estate aforesaid, and intestate, leaving the said T, S, M, and P, his heirs. And it being duly, and according to law, represented and made to appear to S D, Esq., Judge of Probate of Wills and granting administration in and for the said county of E, that the real estate aforesaid, whereof the said L B died so seized, could not be divided among all his children without great prejudice to or spoiling the whole, and that it would conveniently accommodate more of his children than his eldest son, the said Judge, on &c., in pursuance of the power and authority given him by the laws of this Province [commonwealth,] made for the settlement and distribution of intestates' estates, adjudged and decreed — parts, other than her share of the

real estate, whereof the said L B died so seized, unsettled, unto the said P, and settled the same on her, to hold to her and her heirs forever, she paying to the said M, when she came of age, or was married, the sum of £27, with lawful interest for the same from the said &c., day of &c., the said £27 being the said M's proportionate part or share of the value of the real estate, so ordered unto and settled on the said P. And the said P, then and there, while sole and before her intermarriage with the said E, [the joint defendant] accepted the real estate so ordered to, and settled on her, and entered thereinto, and thereby became chargeable to pay the said M the aforesaid sum of £27, with lawful interest for the same, when she came of age, or was married, which first happened, and promised the said M to do it accordingly. And the said M came of age on the &c. day of &c.; yet the said P, though often requested, never paid the said £27, or the interest thereof, while sole; nor since her intermarriage with said E, have the said E and P, or either of them, though alike requested, ever paid the same, but wholly neglect and refuse so to do. TROWBRIDGE.

Against assignee of a term, by assignor, for not repairing, according to the original covenants of the lease.

For that the plaintiff, on &c., at &c., being possessed of two certain messuages or tenements, situate at &c., for the then residue of a certain term of six years, commencing from the &c. day of &c., by virtue of a certain demise or lease thereof, made from one R to the plaintiff and his assignees, by indenture, bearing date the &c. day of &c., under divers covenants and agreements, contained in said indenture, on the part and behalf of the plaintiff, as such lessee thereof, and his assignees, to be kept and performed, of which the said D [defendant] then and there had notice; and in consideration that the plaintiff, at the special request of the said D, would then and there sell and assign over the same to the said D, for the then residue of the said term, subject to the covenants and agreements on the lessee's part and behalf, in the said indenture contained, then and there faithfully promised the plaintiff, that he, the said D, would perform and keep, all and singular such agreements and covenants, from the &c. day of &c., last past. And the plaintiff avers, that, confiding in the said promise of the said D, he did then and there sell and assign over to the said D, the said messuages or tenements, with the appurtenances

so demised to the plaintiff as aforesaid, for the then residue of the said term, subject to such covenants and agreements on the lessee's part and behalf, as aforesaid; and that the said D, by virtue of said sale and assignment, then and there entered upon the same and became and was possessed thereof, for the then residue of the said term; and although, amongst others contained in said indenture, there was a certain covenant and agreement, with the said R, on the part of the plaintiff, as such lessee of the said messuages or tenements, with the appurtenances as aforesaid, well and sufficiently to repair the same during the said term, and to leave them so well and sufficiently repaired, at the expiration thereof; yet the said D, not minding his promise aforesaid, but contriving to injure the plaintiff in this behalf, did not, nor would, though often requested, perform or keep the said covenant and agreement herein before mentioned according to the effect of his said promises, but wholly failed so to do; and on the contrary thereof, after such sale and assignment as aforesaid, by the plaintiff to the said D, and during the said demise, the said D suffered the said messuages or tenements, with the appurtenances, to be greatly ruinous and decayed for want of necessary repairing thereof; and at the expiration of the said term, so left the same out of repair, in breach of the said covenant and agreement, so made by the plaintiff with the said R, and the promise aforesaid of the said D; whereby the plaintiff afterwards, on &c., at &c., was obliged to pay, and did actually pay to the said R, the sum of \$60, as a satisfaction to the said R for such breach of the covenant aforesaid, and his costs of prosecuting a certain action of law against the plaintiff in respect thereof, and also the sum of \$30, in and about the defence of the said action. See 3 *Went.* 4.

By executors for rent for a half year, due since testator's decease.

For that, at &c., on &c., the said R, being possessed for the then residue of a term of years, which is not yet expired, of a certain messuage, yard and appurtenances, situate, &c., the said D, [defendant] in consideration that the said R would, at the special request of the said D, let and demise to him the said messuage, &c., then and there promised the said R to pay him rent therefor, at and after the rate of \$12 per annum, by two equal payments, on &c. and on &c. And the plaintiffs aver, that the said R, confiding in the said promise of the said D, then and there let

and demised the said messuage, &c., to the said D, who entered thereupon, and from thence to the &c. day of &c., continued to hold the same by virtue of said demise; and that after the making of the said promise of the said D, the said R, on &c., at &c., died possessed, for the then residue of the said term of years of the said messuage &c.; whereby the plaintiffs, as executors as aforesaid, became possessed, for the then residue of the said term of years, of the said messuage, &c., until the said &c. day of &c., whereof the said D had notice; by reason of all which, the said D, on the &c. day of &c., last mentioned, became liable to pay to the plaintiffs, as such executors, the sum of \$6, being one half of the said yearly rent, whenever requested.

SECOND COUNT. And for that the said D, afterwards, and after the death of the said R, *viz.* on &c., at &c., being indebted to the plaintiffs, as executors as aforesaid, in the further sum of \$10, for the use and occupation of a certain other messuage, &c., whereof the said R, was, in his lifetime and at his death, possessed, for the residue of a term of years not yet expired, situate, &c., for the space of six months before that time, held, used and enjoyed, at the special request of the said D, and by the permission of the said R, in consideration thereof, then and there promised the plaintiffs, as executors as aforesaid, to pay them the same sum on demand. [*Add a quantum meruit, as in this last count.*] Yet, though often requested, the said D hath never paid the said sums, or either of them, to the plaintiffs, &c. See 3 *Went.* 7.

Against tenant for not managing land in a husband-like manner.

For that, on &c., at &c., the said D [defendant] was holding of the plaintiff, as his tenant, a certain farm with its appurtenances, situate, &c., consisting of &c., for the then residue of a term of nine years, commencing on &c.; and in consideration that the plaintiff, at the special request of the said D, then and there had promised the said D, that he, the plaintiff, would permit the said D, to have, occupy, possess and enjoy the said farm, with the appurtenances, from the expiration of the said term of nine years, for so long a time as the said D and the plaintiff should please, at a certain yearly rent, to be paid therefor by the said D to the plaintiff, for the use and occupation thereof, he, the said D, then and there promised the plaintiff that he, the said E,

during such time as he should hold and enjoy the said farm, &c., by the permission of the plaintiff, would use and occupy said farm in a husband-like manner. And the plaintiff avers, that, giving credit to the said promise of the said D, he hath permitted the said D to hold, occupy and enjoy the said farm with the appurtenances, from the expiration of the said term hitherto, and that the said D hath accordingly held and enjoyed the same; yet the said D, since the expiration of the said term, hath not hitherto occupied the said farm with the appurtenances, in a husband-like manner; but, on the contrary, hath kept, and doth still keep, fifty acres of land, parcel of said farm, in tillage, when the same ought not to be; whereby the said farm is greatly damaged and diminished in value, &c. See 3 *Went.* 26.

For not permitting tenant to carry away wheat, sown during the term, according to agreement.

For that whereas on &c., at &c., it was agreed by and between the said E [defendant] and the plaintiff, that the plaintiff should hold, occupy and enjoy a certain farm of the said E, situate &c., under the certain yearly rent of \$60, for five years then next ensuing, if so long the plaintiff should see fit so to do; and that the plaintiff should be at liberty to determine the said agreement and the said term, at the end of any of those five years; and that whenever the plaintiff should determine said agreement and term, he should, at the next harvest then following, quietly reap and take away all such wheat as should, at the determination of said agreement, be sown or growing on the same farm. And the said E, then and there, in consideration, &c. [*Lay mutual promises.*] And the plaintiff avers, that on &c., at &c., in pursuance of said agreement and promises, he entered into the said farm and the appurtenances, and by virtue of the same, held and occupied the same farm and appurtenances, until &c., when, by virtue of the agreement aforesaid and the liberty therein reserved to him, he delivered up the possession of the said farm with the appurtenances to the said D, viz. at S aforesaid; and that, at the time of his so determining of the said agreement, there were sown and growing on the said farm, ten acres of wheat, at the harvest then next ensuing; of all which the said E then and there had notice; yet the said E, though requested at the said time of harvest, would not permit the plaintiff to enter upon said farm, where the said wheat was growing,

to reap or carry away the same; but, on the contrary, the said E, at the said time of harvest, reaped and carried away the said wheat and converted the same to his own use, &c. See 3 *Went.* 44.

For money to be paid for a watch, on death or marriage.

For that the said E [defendant,] at &c., on &c., in consideration that the plaintiff, at the special request of the said E, had sold and delivered him a certain silver watch, then and there promised the plaintiff to pay him, for the same watch, the sum of \$20 upon the marriage of the said E, or upon the day of his death, whichever should first happen. Now the plaintiff avers, that, on &c., at &c., the said E took to wife one L, and by reason thereof the said sum of \$20 then and there became due and payable to the plaintiff; of which the said E, on &c., at &c., had due notice; yet &c.

For not paying rent for ready furnished lodgings, for the whole time agreed on.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff would permit the said E, to hold, occupy and enjoy a certain ready furnished dwellinghouse with the appurtenances, belonging to the plaintiff, situate in &c., together with the furniture and goods of the plaintiff, in and upon the same, for the space of three months then next ensuing, promised the plaintiff to hire the same of him for the said three months, and to pay him therefor the sum of \$4 for every week of the said three months, amounting in the whole to \$48. And the plaintiff avers, that, confiding in the said promises of the said E, he then and there let to hire to the said E, the said dwellinghouse and appurtenances, together with the furniture and goods aforesaid, and was then and there, and always afterwards, ready and willing to permit the said E to hold, occupy and enjoy the same for the said three months. And the plaintiff further avers, that though the said E did then and there enter into and upon the said demised dwellinghouse and appurtenances, and became and was possessed thereof for the term aforesaid, and though the said E continued therein for part of the said term, viz. &c.; yet the said E would not continue in said dwellinghouse for the remainder of said term, though often requested, but wholly failed and made default; and though the said term of three months is now long since past, hath not paid the plaintiff the said \$48, or any part

thereof, but wholly refuses and neglects so to do. See 3 *Went.* 69.

On promise to pay for goods, if not returned in a limited time.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff would then and there deliver to him, the said E, at his special request, two pieces of flowered velvet on sale, or to return the same in three days, then next ensuing, then and there promised the plaintiff to return to him the said two pieces of velvet in three days next then ensuing, or otherwise he, the said E, would buy the same and pay the plaintiff therefor the price and sum of \$100, on demand. Now the plaintiff avers, that, confiding in the said promise of the said E, he did then and there deliver the said two pieces of velvet to the said E, and that the said E did not within the said three days return the same to the plaintiff; by reason whereof, the said E became the buyer thereof, and liable to pay the plaintiff the said sum of \$100 therefor; yet, &c. See 3 *Went.* 121.

On promise to pay for goods delivered to a third person on an allowance made.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff had, before that time, at the special request of one S, sold and delivered to him, the said S, divers goods and merchandises, of the value of \$100 and there promised the plaintiff, that if he, the plaintiff, would allow \$5 per cent. (that is to say, at the rate of \$5 in the hundred) deduction from the said \$100, he, the said E, would then and there advance to the plaintiff the sum of \$95, being the remainder of such sum of \$100, after such deduction made; and although the plaintiff, from the time of said promise hitherto, always hath been and still is ready and willing to make such deduction or allowance as aforesaid, of which the said E, on &c., at &c., had notice, and was then and there requested to advance to the plaintiff the said sum of \$95, according to the said E's promise aforesaid; yet, &c. See 3 *Went.* 122.

On a promise to take back a horse if unsound, and to repay the price.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff had, then and there, at the special request of the said E, bought of him a certain horse for the price of \$100, then and there paid by the plaintiff to the said E, then and there promised the plaintiff, that if he

would receive the said horse and the same should prove unsound, he, the said E, would take back said horse and return to the plaintiff the said price so by him paid for the same. Now the plaintiff avers, that though he then and there received the said horse, on the terms aforesaid, in faith of the promise of the said E, and though the same horse afterwards proved to be unsound in the eyes, at the time of the sale and delivery aforesaid, and so remained, of which the said E, on &c., at &c., had notice; yet the said E, not minding his promise aforesaid, but designing to defraud the plaintiff, though on &c., at &c., requested, hath not as yet taken back the said horse, nor hath yet repaid to the plaintiff the said price of the same, so as aforesaid received by the said E, but hath wholly refused and still refuses so to do.

For letting a horse to hire, to plaintiff, not capable of performing the journey.

For that the said T [defendant,] on &c., at &c., in consideration that the plaintiff, at the special request of the said T, had hired of him one gelding, for a journey with the plaintiff from thence to C, for the hire and price of \$5, then and there promised the plaintiff, that the said gelding was able and fit to perform the said journey; and although the plaintiff, on &c., set forward on his said journey to C, on the gelding so hired as aforesaid, yet, notwithstanding the promise of the said T, the said gelding was not able and fit to perform the said journey, but tired on the road, in the said journey, and became unable and unfit to perform the residue of the said journey; by reason of which, the plaintiff sustained great expenses in and about the providing himself with horses for the residue of the said journey. See 2 *Went.* 155.

For not completing the purchase of a ship, bought by defendant at auction.

For that the plaintiffs, on &c., at &c., were owners and proprietors of a certain ship, called the Sally, and there, on the same day, caused the said ship, then lying at the wharf of the plaintiffs in said B, to be exposed to public sale by one S B, there and then a broker, on the following conditions, *viz.* the plaintiffs did consent and agree to and with the buyer, that whosoever should bid most and last in due time, after he should have declared his name, and the broker should have repeated the same, should be deemed the buyer, who

was immediately to pay down one quarter part of what said ship should be sold for, into the hands of the said broker, and the remainder within twenty days after the sale, and \$5 more to the broker, to bind the purchase; and upon payment of the whole purchase money, a legal bill or bills of sale should be made unto the said purchaser of said ship, and the said ship with what belonged to her, should be delivered according to the inventory which had been exposed, which inventory should be made good only as to the quantity; and the said ship and stores should be taken, with all faults, in the condition they then lay; but in case default should be made by the purchaser in any of the payments hereafter mentioned, the money, paid in part, should be forfeited to the sole use of the said proprietors and their assigns, without any liability to refund, in law or equity, any such money so forfeited as aforesaid; and the buyer so neglecting, should be liable to all costs and damages accruing thereby; and that if any difference should arise respecting the buyer at the sale, then the said ship should be put up again, as the plaintiffs then and there caused to be published. And the plaintiffs aver further, that the said ship was then and there publicly put up to sale upon the terms and conditions aforesaid, and that the said T then and there was the highest bidder, and bid for the same \$2000, which sum was then and there the most and last bidding, that was at the said sale, in due time bid for the same; and the said T then and there declared his name as the buyer thereof; and the said broker then and there repeated the same and declared the said T the buyer of the said ship, at the said sum of \$2000; and the said T then and there consented thereto, and to the binding of the said purchase, and thereby became liable, and in consideration thereof, then and there promised the plaintiffs to pay them the said sum of \$2000, according to the said conditions of said sale. And although the plaintiffs have always hitherto, from the time of said sale, been ready and willing to perform and fulfil all the said conditions on their part to be performed and fulfilled, and although the said T, afterwards, on the said day of said sale, paid into the hands of the said broker the one quarter part of what said ship sold for, viz. \$500; yet the said T, though on &c., at &c., requested, hath never paid the sum of \$1500, residue of the said \$2000, but wholly neglects and refuses so to do.

Add a count for goods sold and delivered. See 3 Went. 213.

Against administrator for not conveying land sold by him at vendue.

For that whereas, by the consideration of our justices of our S. J. Court, held &c., the said D and E [defendants,] being administrators of the estate of T B, late of —, &c., and having represented the said estate as insolvent, were, upon their petition to said court, duly authorized and empowered, to make sale of that part of said deceased's real estate, which was set off to the widow of the said deceased for her dower, being about — acres of land, consisting of &c., situate &c.; and afterwards, on &c., the said D and E by notifications in writing under their hands, did give public notice that the said — acres of land should be sold to the highest bidder, meaning to the person who should appear to give the most for the same, at a public vendue, to be held at &c., on &c. And the plaintiff attended at the time and place aforesaid, with intent to purchase the premises; and the said D and E, then and there also attended, according to their notification aforesaid; and there being divers persons then and there, for the purpose aforesaid, assembled, the said D and E then and there published and proclaimed certain articles of sale, in writing under their hands, wherein it was stipulated, that whoever should bid for the premises, should lay down \$4; that he to whom the premises should be struck off, should give good security to the said D and E, for the payment of one half of the purchase money on the — day of — &c., and for the payment of the other half on the — day of &c., next following. And the said D and E then and there promised [to the plaintiff and] to any other person, who should be the highest bidder, and to whom the premises should be struck off, that he should have a deed of the premises duly executed and delivered him by the said D and E with all convenient speed, he performing the aforesaid articles on his part to be performed. Now the plaintiff avers, that after divers sums had been bid by divers persons, he, the plaintiff, did bid for the premises the sum of \$—, and did then and there lay down \$4; that he was the highest bidder; and the premises were then and there, by the said D, who acted as vendue-master, struck off to the plaintiff; and the said D and E did then and there receive of the plaintiff the said \$4, as earnest of the bargain, and then and there promised the plaintiff that they would make, execute and deliver to the plaintiff, a good and sufficient deed of the premises, on the Monday then next following, at &c. And the plaintiff further avers, that he

was, at said &c., on said Monday, ready to give good and sufficient security as aforesaid, and then and there tendered to said D and E, an obligation duly executed by the plaintiff and one A and one B, for the penal sum of \$—, conditioned for the payment of \$—, being one half the purchase money of the premises aforesaid, according to the auction aforesaid, on the said — day of &c., and for the payment of \$—, being the other half of the said purchase money, on the said — day of &c.; which obligation, the plaintiff avers, was good and sufficient security, according to the intent and meaning of said articles; and he hath ever since been, and is still ready to deliver to the said D and E, the same obligation; but they, the said D and E, then and there refused to accept the same, and they and each of them then did, and still do, refuse to execute and deliver a deed of the premises, though then and there requested thereto.

For not returning a mare and tackle hired.

For that, on &c., at &c., the said C [def.] hired and received of the plaintiff, the plaintiff's bay mare, saddle and bridle of the value of \$—, for a journey from A to B, and back again to A, and then and there promised the plaintiff to return the said mare, saddle, and bridle, to him, at his, the said C's return, the same day, in good order; yet the said C, not regarding his promise aforesaid, did not return the said mare, &c., according to his promise, but though often requested, &c.

On a promise of a reward in a Gazette.

For that whereas divers goods and chattels, to the value of \$—, were, on &c., feloniously taken and carried away, by certain mal. factors and persons unknown, from the mansion-house of said B, situate in &c., as the said B caused to be reported and published, he, the said B, on &c., at &c., in which town said house is situated, in consideration that the aforesaid A, or any other person, would give notice where the said goods were, so that the same goods or any part thereof were restored again, promised that he would pay and satisfy to the persons or person, so discovering said goods, \$—, or proportionably for any part thereof. And the said A, in fact says, he, upon the hope of the faithful performance of said promise &c., so made by the said B, as aforesaid, did, on &c., at &c., give notice to said B, of the greatest part of the goods so lost as aforesaid, to wit, of so

much of them as came to the value of \$—, so that the same goods, and of the value of \$—, aforesaid, did, on &c., at &c., by reason of said notice, come to, and were restored again to the hands and possession of said B, whereby the said B ought, according to his promise &c., to have paid to said A, \$—, being a proportionable part of the reward, so promised by the said B to be by him paid, on the discovery and restoring of the goods &c., lost as aforesaid; yet, &c.

Husband and wife v. executor of her father, for a legacy.

For that whereas, on &c., at &c., the said D made his testament, and thereby gave to said B, his daughter, then wife of the said A, \$—, to be paid by his executors in — years after his decease, and appointed the said C, the son, executor of the testament aforesaid, and afterwards, on &c., the said D died, and on &c., at &c., the said C, before G H, late Judge of the Probate of Wills, in the said county, proved the will aforesaid, and accepted the trust of executor thereof, and thereby became chargeable to the said A, and B, his wife, to pay them within — years after the decease of the said D, \$—; yet, &c.

Against prize agents, for not disposing of a prize to the best advantage.

For that on &c., at &c., one E and F were owners of a certain privateer, called the A, under the command of the plaintiff; and the cargo of goods and merchandises on board a certain brigantine, called the Hope, had been taken as a prize by the said privateer, under the command of the plaintiff, and had been legally condemned as a prize to the said privateer, in the District Court of Massachusetts district; whereby the plaintiff, as master of said privateer, became entitled to seven shares of and in the said prize. And the said D and G [defendants,] in consideration that the plaintiff and the said owners of the said privateer, at the special request of the said D and G, had employed the said D and G, as their agents, to sell and dispose of the said cargo of goods and merchandises, for a certain hire and commission, to be paid to the said D and G, by the plaintiff and the said owners of the said privateer, then and there promised the plaintiff, to sell and dispose of the said cargo of goods and merchandises, at and for the best prices and most advantageous terms for the sellers thereof, that the said D and E could obtain therefor. And the plaintiff says, that the said D and E afterwards, on &c., at &c., sold and dis-

posed of the said cargo of goods and merchandises; yet not minding their promise aforesaid, they did not sell and dispose thereof, for and at the best prices and most advantageous terms they could obtain therefor, but neglected and omitted so to do, and sold the same cargo of goods and merchandises at much less, *viz.* \$4000, than they might and could have obtained for the same; whereby the plaintiff hath sustained, on his share of the said prize, the loss of the sum of \$500.

SECOND COUNT. And for that the said D and G, on &c., at &c., in consideration that the plaintiff, at the special request of said D and G, had employed the said D and G, as agents to sell and dispose of his shares, in and of a cargo of goods and merchandises, on board a certain other brigantine, called &c., for a certain reward, hire, or commission, to be paid therefor by the plaintiff, to the said D and G, promised, &c. [*As before.*] See 3 *Went.* 279.

Against agent, for not making insurance.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff, at the special request of said E, had retained and employed him as his agent, to effect a certain insurance against the dangers of the seas, for and on account of the plaintiff, upon a certain ship of the plaintiff, called &c., and the freight thereof, at and from M, in parts beyond seas, to the said port of B, to a large amount, *viz.* the sum of \$4000, for a certain reasonable commission or reward, to be therefor paid by the plaintiff to the said E, promised the plaintiff to effect such insurance as aforesaid, for and on account of the plaintiff. And the plaintiff avers, that the said ship was then in good safety at M aforesaid; and although the said D, after making said promise, and before he had any notice of the loss of the said ship, hereafter mentioned, could and might have effected such insurance as aforesaid, for and on account of the plaintiff; and although the plaintiff, at the time of making said promise, and from thence to the time of the loss hereafter mentioned, was interested in the said ship and the freight thereof, to a large amount, *viz.* the said sum of \$4000, *viz.* at B aforesaid; yet the said E, not regarding his promise aforesaid, but contriving to defraud the plaintiff in this behalf, did not, nor would effect such insurance as aforesaid, for and on account of the plaintiff, but therein wholly failed and made de-

fault. And the plaintiff further says, that after the making the promise aforesaid, and before her arrival at said B, *viz.* at &c., on &c., the said ship, by and through the mere dangers of the seas, and by force of stormy weather, was stranded and wrecked, and a great part of the cargo, with which she was laden, was thereby, then and there lost; whereby the plaintiff sustained a great loss upon the said ship and the freight thereof, to a large amount, *viz.* \$3000, and by reason of such default of the said E, hath been, and is wholly deprived of all indemnity from said loss, *viz.* at said B, &c. See 3 *Went.* 523, 525.

In relation to the duty of an agent, to cause insurance to be effected on the property of his principal. See Law Summary, p. 156, (2d Edition.)

Against executor, on promise of testator to make a mortgage.

For that the said A [testator,] in his lifetime, *viz.* on &c., at &c., in consideration that the plaintiff, at the special request of said A, had lent and advanced him the sum of \$100, promised the plaintiff to make to him a mortgage for, or pay the said sum of \$100, with interest, upon request; yet the said A, in his lifetime, or since his death, the said E, [defendant,] though on &c., at &c., thereto requested, has not made a mortgage &c., or paid the said sum, &c. See 3 *Went.* 547.

For not paying for goods delivered to a third person, according to promise of responsibility.

For that the said E [defendant,] on &c., at &c., in consideration that the plaintiff would, at the special request of the said E, then and there sell and deliver to one R, one hogshead of rum, of the value of \$100, promised the plaintiff that he, the said E, *would be answerable for the money*, that is, for the price to be paid for the same, being forthcoming, at the proper time of payment. And the plaintiff says, that confiding in the said promise of the said E, he did, then and there, sell and deliver the said hogshead of rum, being of the value aforesaid, to the said R, and that the proper time of payment of the same, was at the expiration of six months from the said sale and delivery thereof; whereof the said E then and there had notice, and by reason thereof, and of his promise aforesaid, became answerable for the said \$100, being forthcoming to the plaintiff, at the said proper time of payment of the same.

Add quantum meruit for goods sold to defendants; for goods sold and delivered to R, at defendant's request; and indebitatus assumpsit for goods, &c.

Conclusion.

Yet the said E, not regarding his promises aforesaid, but fraudulently intending to deceive the plaintiff in this behalf, hath never paid the said sums, or either or any of them, though requested thereto, after the same became due and payable at the end of the said six months, and, though the said sums yet remain unpaid to the plaintiff, wholly neglects and refuses so to do. See 3 *Went.* 554.

By parson, for not paying salary according to settlement.

For that the said inhabitants, on &c., at their parish meeting, duly and legally assembled, and held within the said parish, did vote and agree, to call and elect the plaintiff to the work of the ministry with them in the said parish. And the said inhabitants, afterwards, viz. on &c., at their other parish meeting, duly and legally assembled and held within the said parish, in consideration that the plaintiff would accept of their call and election to settle with them, and carry on the work of the ministry in said parish, did then and there further vote, promise, and agree, to and with the plaintiff, to give and pay him the sum of \$—, as and for his settlement among them, in the gospel ministry as aforesaid; the one half thereof to be paid him in money; the other half in boards, shingles and nails, at money prices; and also give and pay him another sum of \$—, yearly, and ten cords of wood, cord wood length, to be brought to his door yearly, as and for his salary, so long as he would stand in the relation of a pastor to them. And the said inhabitants, at their said meeting last abovementioned, did further vote, promise and agree to and with the plaintiff, if the said parish should consist of eighty rateable families, which he avers it never did, that then, and in such case they would give and pay him the sum of \$—, as and for his salary yearly, during the term aforesaid. And the plaintiff in fact says, that, relying on the several votes beforementioned, of the said inhabitants, he, on &c., at &c., did accept of the said call and election, and duly settled with them in the office of the ministry in the said parish, and hath ever since constantly and regularly continued to carry on, perform and discharge the duties, work and business incumbent upon him as a minister of said parish, and hath ever since stood, and still standeth in the relation of a pastor to the said inhabitants. And the plaintiff further avers, that there are now in arrears and due to him, from said inhabitants, the sum of \$—, and — cords

of wood of the value of \$—, for — years' salary, ending the — day of &c.; yet the said inhabitants, not regarding their votes, promises and agreements aforesaid, but intending and contriving to injure, vex, and oppress the plaintiff, though often requested by him, have not paid him the same sum of \$—; nor have they, or any of them, ever given or delivered him the said — cords of wood, or any part thereof, though he hath always, viz. at his dwelling-house in said parish, been ready to receive the same; but they unjustly neglect and refuse to pay him the same sum or to deliver him the same wood, or in any way to satisfy him therefor.

F. DANA.

For delivering, for a china enamelled standish, one made in imitation only; [in nature of case for deceit.]

For that the said T [defendant,] on &c., at &c., in consideration that the plaintiff had, then and there, promised the said T, at his special request, to pay him on demand \$100, promised the plaintiff faithfully to deliver to him, the plaintiff, on demand, one china enamelled standish, of the value of \$100; yet the said T, not regarding his promise aforesaid, but contriving to defraud the plaintiff in this behalf, though on &c., at &c., thereto requested, did not deliver the plaintiff one china enamelled standish, of the value of \$100; but instead thereof, did then and there deceitfully and fraudulently deliver to the plaintiff, one other enamelled standish made in imitation of a china enamelled standish, of the value of \$3 and no more, contrary to his promise aforesaid. [*Add money counts.*] See 3 *Went.* 140.

By a collector, for taxes.

Attach T &c., to answer to K M, of said Marblehead, mariner, and a collector of taxes for the year 1789, duly appointed and sworn, in a plea of the case; for that whereas the said T, in the year aforesaid, resided and inhabited at said Marblehead, and was then and there duly rateable, and was accordingly, by the assessors of that town, duly rated and assessed to the State, County and Town taxes, the sum of \$—, and which rates among others, were there, by the assessors, viz. on &c., in the same year, committed to the plaintiff to collect; of all which the said T, then and there had notice, and was required to pay the same, but neglected so to do; and afterwards, viz. on &c., removed from the said town of Marblehead, the said rates against him being

wholly unpaid ; whereby he became liable to the plaintiff for the amount thereof, as his proper debt ; and in consideration thereof, then and there promised the plaintiff to pay him the said sum of \$—, on demand.

SECOND COUNT. And for that whereas the said T, at said Marblehead, on &c., was indebted to the plaintiff in the sum of \$—, for the amount of the State, County, and Town rates, duly assessed upon the said T, in and for the year 1789, in said Marblehead, where he then inhabited, and which rates were, with others committed to the plaintiff to collect, and being other than aforementioned, in consideration thereof, then and there promised the plaintiff, to pay him that sum on demand ; yet, though often requested, he hath never paid the said sums, or either of them, but wholly refuses and neglects so to do. A. D. 1793. SEWALL.

By a collector for taxes, [specially stated.]

For that the freeholders and other inhabitants of the said town of A, qualified by law to vote in town affairs, duly met and assembled in town-meeting, legally called and held in said town, on &c., voted, granted and agreed upon a tax or assessment, of £—, of the value of \$—, to be assessed, and raised on the inhabitants within the same town, as the law directs, for paying the said town's debts, and defraying the necessary charges arising within the same. And the legislature of said commonwealth, by a law passed on &c., granted a tax of £—, of the value of \$—, to be assessed, collected, and applied in and for said county of Essex. And the Court of General Sessions of the Peace, begun and holden at &c., within and for the same county of Essex, on &c., apportioned the same tax and sum, on the several towns and districts in the said county, according to law, and directed the clerk of said court to issue warrants. Accordingly, among other warrants, the said clerk issued a warrant to the assessors of the said town of A, requiring them to assess on the inhabitants of said town, as the law directs, the sum of £—, of the value of \$—. And afterwards, on &c., at said A, the assessors of said town, being legally chosen and sworn, assessed on the said inhabitants of the said town, according to law, the two sums aforesaid, viz. the said £—, and the said £—, amounting in the whole to £—, the said county tax being too small to be assessed separately ; and then and there, among other assessments, assessed on the said

E [defendant,] then an inhabitant of said town of A, the sum of £—, of the value of \$—, being his proportion of the aforesaid whole sum; and there, on the same day, made and committed to the plaintiff, then and there one of the sworn collectors of the said town, legally chosen, a list containing a part of said sum, *viz.* £—, of the value of \$—, together with their warrant, in due form of law, directing and authorizing him to collect the same, of the several persons named in his said list, in manner by law prescribed, and to pay the same over to the treasurer of said county of Essex, and the treasurer of said town of A, respectively, before the &c., day of &c., then next ensuing, and now past; in which list, committed to the plaintiff, was included the said tax on the said E. And the plaintiff afterwards, *viz.* on &c., at said A, then and there being collector as aforesaid, demanded of, and required the said E to pay the same tax, so assessed on him, which he wholly refused and neglected to do. And afterwards, *viz.* on &c., the said E, the said tax remaining unpaid, removed from said town of A, and left no goods or estate whereof the said tax, so assessed on the said E, could be satisfied; by reason of all which, and by force of the law in such cases made and provided, an action hath accrued to the plaintiff, as collector as aforesaid, to sue for and recover the same; yet the said E hath not paid the same, or any part thereof, but neglects so to do. See *Mass. Act*, 1789. DANE.

For laming a horse, on promises; [in nature of case for negligence.]

For that the said D [defendant,] on &c., at &c., in consideration that the plaintiff had, then and there, at the special request of the said D, lent and delivered him a gelding of the plaintiff, of the value of \$—, for him to ride single on, from A to B, and thence back to said A, promised the plaintiff to feed, keep and moderately use said gelding, and to deliver the same to the plaintiff, after performance of said journey, safe and sound; and also that he, the said D, would pay the plaintiff on demand, at the rate of \$— per day, for the hire of said gelding for each day he, the said D, kept the said gelding. And the plaintiff says, that the said D kept the said gelding fourteen days next after the lending aforesaid; and thereupon \$— became due to him therefor, according to the rate aforesaid; yet the said D, though requested, hath never paid the same; and contriving to defraud the plaintiff in this behalf, and not minding his pro-

mise aforesaid, hath never returned the said gelding, after the journey aforesaid, to the plaintiff, safe and sound ; but, on the contrary, hath so negligently kept said gelding, and with carrying double in said journey, so tired and immoderately worked and ill used said gelding, that, by means thereof, the said gelding has become of no value to the plaintiff.

Another.

For that the plaintiff, on &c., at &c., at the special request of the said T [defendant,] delivered and accommodated a certain horse, the property of the plaintiff, of the value of \$—, to the said T, to ride from S to N, and no farther, and thence back again to said S, for a certain sum agreed on between them ; in consideration whereof, the said T then and there promised the plaintiff faithfully, that he would take care of, and that no harm should come to, said horse, and that he would in no wise abuse, or suffer said horse to be hurt. And the plaintiff having confidence in the said promise of the said T, delivered him the said horse in manner aforesaid ; yet the said T, not regarding his promise aforesaid, rode the same horse immoderately from said S to said N, and there, without the plaintiff's knowledge or leave, let the same horse out to hire to one H, to carry a large load from said N to B, being forty miles. And the said T and the said H rode the same horse so immoderately, and kept him so ill, that he became lame and diseased ; and the plaintiff has been obliged to expend large sums of money to effect the cure of said horse, and has wholly lost the service of the said horse from the — day of &c., to the — day of &c., and is in danger of losing said horse wholly.

THACHER.

Against hoyman for wasting goods ; [in nature of case for negligence.]

For that the said E [defendant,] on &c., at &c., received of the plaintiff one thousand pounds of hemp, to be transported, for his reasonable allowance therefor, from the plaintiff's vessel, in the harbor of said S, to &c., in the same place, and there to be delivered to one V and one O, viz. five hundred pounds to said V, and the other five hundred pounds to said O ; in consideration whereof, the said E then and there promised the plaintiff faithfully to do the same accordingly ; yet the said E hath not delivered the same hemp, according to his said promise, though then and there re-

quested, but hath wasted, destroyed, and converted one hundred pounds thereof, of the value of \$—, to his own use.

PYNCHON.

16. *On various other contracts, &c.*

For freight.

And for that the said E thereafterwards, on &c., in consideration of the said plaintiffs' suffering and permitting him, the said E, to lade on board the said plaintiffs' ship, called the F, whereof the said E was master, in her last voyage, at &c., one other quantity of five thousand one hundred pounds weight of coffee, and twelve bales of cotton, than those in the annexed account mentioned, and the said plaintiffs' ship F, bringing and transporting the said coffee and cotton from A to B aforesaid, and there delivering the same to the said E, promised the plaintiffs to pay them the usual and customary freight for such goods and merchandise, transported in such ship from A to B, aforesaid, which the plaintiffs aver is one full third part of such goods and merchandise, which third the said plaintiffs say is of the value of \$—, of all which the said E before that time, on the same day, had notice, and was requested to deliver and pay the same, but unjustly refused and neglected, and still refuses and neglects; to the damage &c. *Stevenson v. Coffin, Essex, 1781.*

T. PARSONS.

For the general doctrine with regard to the earning and paying of freight. See Law Summary, p. 307.

Against owners; for not paying a bill of exchange, drawn by their captain and indorsed over to the plaintiff.

For that the said D, E, and F, at &c., on &c., being owners of the schooner I, then lying in the harbor of Portland, and about to sail on an intended voyage to the Island of Hispaniola, and one A A being then master of said schooner, by them appointed, and there being, then and there, laded on board said schooner, a cargo of merchandise, belonging to them and consigned by them to said A A, to be by him sold in the West Indies for their account, and the proceeds thereof to be invested in a return cargo, they, the said D, E and F, did then and there, by their instructions in writing to the said A A, among other things, grant to him liberty and authority, in case produce should be abundant, and the price low at Hispaniola, and he could

put more produce into his schooner than his cargo out would purchase, to fill her up with produce, and to draw bills of exchange upon them, payable at sixty days after sight thereof, for such sum as should be requisite for that purpose. And the plaintiff says, that said A A did afterwards proceed in said schooner to a place called J, in the Island of Hispaniola, and that produce there being abundant, and the price low, and the said schooner being capable of containing and carrying more produce, than the cargo carried out in her as aforesaid would purchase, he, the said A A, did there, to wit, at S aforesaid, on &c., in order to fill up said schooner, and fully load her with produce, borrow, take, and receive of one B B the sum of &c., and therefor did then and there, according to the custom of merchants, make and draw his bill of exchange, in writing of that same date, upon them, the said D, E and F, by the name of D D, E E, and F F, all merchants of P, in the state of M, thereby requiring them to pay to said B B, by the name of captain B B, or his order, sixty days after sight of that his first bill of exchange, the second and third of the same tenor and date being unpaid, the sum of \$—, being for value received on account, and *for lading your schooner I*, without further advice, and then and there delivered the said bill of exchange to the said B B, and he, the said B B, thereafterwards on that same day, at S aforesaid, and before the payment of the sum of money therein mentioned, indorsed the said bill according to the said custom, and by that indorsement appointed the contents of said bill to be paid to one C C, or his order, and then and there delivered the said bill so indorsed to said C C, and afterwards, on &c., and before the payment of the sum of money in said bill mentioned, or of any part thereof, at S aforesaid, the said C C, according to the custom aforesaid, indorsed the said bill, and by that indorsement appointed the contents thereof to be paid to the plaintiff, and then and there delivered the said bill so indorsed, to him, of all which the said D, E and F, thereafterwards on the same day, had notice. And the plaintiff saith, that, afterwards and before the payment of said sum of money in said bill mentioned, to wit, on &c., at S aforesaid, the said bill was shown and presented to said D, E and F, with the several indorsements aforesaid thereon, who then and there accepted the same bill, to pay the same according to the tenor and effect thereof, and the several indorsements thereon, and by rea-

son thereof, and of the premises, and according to the custom aforesaid, they became liable to pay to the plaintiff, the said sum of money in the said bill specified, according to the tenor and effect thereof, and of his aforesaid acceptance thereof, and the said indorsement so made thereon as aforesaid and being so liable, they, the said D, E and F, then and there in consideration thereof, promised the plaintiff to pay him the same accordingly, and the plaintiff says, that sixty days from the time said bill was shown and presented to the said D, E and F, as aforesaid, have expired, and yet that they, the said D, E, and F, although at the expiration of said sixty days, to wit, on &c., at &c., they were thereto requested, have never paid said sum in said bill specified, or any part thereof, but they neglect so to do. *Gray v. Storer et al.*, S. J. C., 1800.

NOTE. There does not appear any sufficient reason, why the declaration might not have been simply on the bill of exchange, without the special statement of circumstances, on which the acceptance was grounded. The awkward expression, "for lading your schooner," could be intended in the declaration, where it seems insensible, for no other purpose than to prevent a variance, and in the bill of exchange, was only used to induce the owners to accept, by informing them on what account it was drawn.

For not paying an order, which defendant promised to pay if plaintiff would obtain it from A A.

1. *In consideration that plaintiff would procure an order from R R, defendant promised to pay.*

For that whereas one R R was indebted to the said P in a certain sum of money, exceeding £12, and also whereas the said T was indebted, as he said, to the said R R in the sum of £12, or thereabout, the said T on &c. at &c., in consideration that the said P, at the special instance and request of the said T, would procure an order of the said R R in writing under his hand, to the said T, for the payment of the money, which the same T owed to the said R R, or any part thereof, to the said P undertook, and to the said P then and there faithfully promised, that he, the said T, the said sum of money or any part thereof, according to an order of the same kind would well and faithfully pay and satisfy. And the said P in fact says, that confiding in the promise and undertaking aforesaid of the said T, thereafterwards on the same day, he, the said P, procured an order of the said R R in writing, and under the hand and with the name of the said R R subscribed, and to the said

T directed, and wherein the said R R requested the said T, upon sight of the order or note aforesaid, to pay to the said P, or his order £5, and to place the same to the account of him, the said R R, and the said P thereafterwards, to wit, on the same day and year, showed to the said T the said order and note and requested the said T to pay him, the said P, the said £5, and the said T then and there had sight of the said order and note aforesaid, yet the said T, not regarding his promise and undertaking aforesaid, but contriving and fraudulently intending, the said P in this behalf subtilly and artfully to deceive and defraud, though often requested, has never paid to the said P the said £5, or any part thereof, or in any other manner satisfied him therefor, but hitherto hath altogether refused to pay him the same, and still refuses.

2. *In consideration that plaintiff had procured an order from A A, defendant promised to pay.*

And also whereas the said P, thereafterwards, on the same day, had procured an order of one A A, in writing, under the hand and with the name of the same A A subscribed, and to the said E directed, and wherein the said A A had requested the said E, upon sight of the same order or note to pay him the said P, or his order, £5, and to place the same to the account of the said A A, he, the said E, in consideration thereof, thereafterwards, on the same day undertook and to the said P then and there faithfully promised that he, the said E, would well and faithfully pay and satisfy the said £5 last mentioned, to the said P, when he should thereunto afterwards be requested; yet the said E, his promise and undertaking aforesaid, last mentioned, not regarding, but contriving and fraudulently intending the said P, in this behalf, subtilly and artfully to deceive and defraud, the said £5 last mentioned to the said E, though to this by the said P, on &c., and often afterwards, at &c., requested, has never paid, nor in any manner whatever satisfied, but hitherto hath refused to pay the said P the said sum, and yet refuses. To the damage &c. 2 Vent. 69, 70.

NOTE. On demurrer to this declaration it was objected, that it was not sufficiently shown, that the defendant was indebted to A A, and if not, then there was no consideration for the promise: 2, That it was not alleged, that the plaintiff procured the note at the request of the defendant: 3, That there was no special request to pay. But the objections were all overruled. 2 Vent. 71, 74. (MSS.)

For not collecting a demand whereby the same became barred by the statute of limitations.

1st COUNT. — *On a promise to collect or sue, &c. in a reasonable time.*

For that the said plaintiff, at a place called B, to wit, at &c. aforesaid, on &c., delivered to the said T a certain promissory note, given by one A A of &c., to said plaintiff, dated at &c., of the amount of eight pounds, equal to twenty-six dollars and sixty-seven cents, more than fifteen months before an action on said note would be barred by the several statutes of limitations of this Commonwealth limiting personal actions. And the said T, in consideration that the said plaintiff then and there promised the said T, to pay him as much money as the said T reasonably deserved to have, for the performance of his promise hereafter mentioned, then and there promised the plaintiff to put the said note in suit, or otherwise to procure the amount thereof of the said A A, for the said plaintiff, in a reasonable time; yet, though the plaintiff, from the time of delivering the said note, until the present time, has been and now is ready to perform all things on his part to be performed, the said T, unmindful of his promise aforesaid, and intending to defraud and injure the plaintiff in this behalf, has wholly neglected to put the said note in suit, or otherwise to procure the amount thereof of the said A A for the plaintiff, before an action thereon was barred by the said statutes, whereby the plaintiff has wholly lost all the money due thereon.

2d COUNT. — *On a promise to sue or return, &c.*

And for that the said plaintiff, at a place called B, to wit, at &c. aforesaid, on &c., delivered to the said E another certain promissory note, signed by one B B, and given by him to said plaintiff, dated &c., of the amount of £7, 4s. equal to \$24, and also an account of said plaintiff's against one C C to the amount of £12, 9s., equal to \$41 and fifty cents, more than fifteen months before an action, on said note and account, would be barred by the several statutes of this Commonwealth limiting personal actions; and the said E, in consideration that the said plaintiff then and there promised the said E, to pay him as much money as he reasonably deserved to have for the performance of his promise hereafter mentioned, then and there promised the plaintiff to put the said note and account in suit for him, in a reasonable time,

and if he recovered the amount, then to pay the same over to the said plaintiff, or if he did not put them in suit, to return the same to the said plaintiff within a reasonable time; yet though the said plaintiff, from the time of delivering the said note and account, until the present time, has been and now is, ready to perform all things on his part to be performed, the said E unmindful of his promise aforesaid, and intending to injure and defraud the plaintiff in this behalf, wholly neglected to put the said note and account in suit for the plaintiff, before the actions thereon were barred by the statutes of limitations of this Commonwealth, nor has he ever returned the said note and account to the plaintiff, nor has he recovered the amount or any part thereof, and paid the same to said plaintiff, by reason whereof and of the statutes aforesaid, said plaintiff has wholly lost all the moneys due on said note and account.

3d COUNT. — For not suing or returning, in a reasonable time; stated differently.

And for that the said T, at a place called B, to wit, at &c., on &c., in consideration that the plaintiff had then and there, at said T's request, delivered to the said T a certain other note of hand signed by B B, bearing date &c., in and by which note said B B promised the plaintiff to pay him the sum of £7, 4s., of the value, as the plaintiff avers, of \$24, on demand, and also another account of the plaintiff against C C, amounting to £12, 9s. of the value of \$41 and fifty cents, as the plaintiff avers, payable to the plaintiff by the said C C, on demand, which sums of money, the plaintiff avers, were then justly due to him, as aforesaid, to put the same securities in suit, and collect the moneys due thereon, and pay the same over to the plaintiff in a reasonable time, deducting therefrom his, the said T's, expenses, or return the same securities to the plaintiff in a reasonable time, if the said T should not put them in suit, he, the said T, promised the plaintiff that he would either put the said securities in suit, in a reasonable time, and upon the recovery of the moneys due thereon, pay the same over to the plaintiff in a reasonable time, deducting his, the said T's, expenses, in the premises, or that he, the said T, would return to the plaintiff in a reasonable time, the same securities, in case he should not put the same in suit. Now the plaintiff avers, that the said T in no wise regarding his promise aforesaid, never put the said securities in suit, never

recovered the moneys due thereon, nor ever redelivered the same to the plaintiff, but unreasonably detained them in his, the said T's own possession, until all legal remedy thereupon was barred by lapse of time, by reason whereof the plaintiff hath wholly lost all benefit of the said securities, and all the moneys due thereon.

4th COUNT.— *On a promise to collect, or sue, or return, &c., in a reasonable time, &c.*

And for that the said T, thereafterwards, on &c., in consideration that the plaintiff had then and there, at said T's request, delivered him one other note of hand, signed by L L of &c., bearing date &c., in and by which the said L L promised the plaintiff to pay him £8, of the value, as the plaintiff avers, of \$23 and twenty-seven cents, to collect the contents of the same for the said plaintiff in a reasonable time, and to put the same in suit in a reasonable time, if the said T could not collect the contents without, and to pay over the said contents in a reasonable time to the said plaintiff, if collected or recovered by the said T, deducting therefrom his, the said T's expenses and costs of suit, he, the said T, promised the plaintiff, that he, the said T, would collect the said contents in a reasonable time, if he could, and would, in a reasonable time, put the same note in suit, if he could not collect the said contents without, and that upon recovering the said contents, he would pay the same to the plaintiff in a reasonable time, deducting the costs of suit, and his, the said T's, reasonable expenses in the premises. Now the plaintiff avers, that the said T, disregarding his said promise, never recovered the contents of the said note, and never put the same in suit, though he well might, but detained the same in his possession a long and unreasonable time, until all legal remedy thereupon was barred by lapse of time, by reason whereof the plaintiff hath wholly lost all benefit of said note and of the money due thereon. *Putnam v. Vinal, S. J. C, Essex, 1798.*

Against an innholder for suffering plaintiff's horse to stray away, &c.

For that whereas, according to the law and custom of the land, the innkeepers that keep common inns to lodge travellers therein, who abide in the same, are bound to keep their goods and chattels, being within those inns, day and night without diminution, pilfering, or loss, so that no damage or loss may happen to any such travellers, or such

guests, for want of due care in such innkeepers or their servants; and the said plaintiff, on &c., at &c., being lodged in the inn of the said T, had a certain gelding, of the value of \$—, within that inn, and delivered the same to the said T, then and there to be safely kept; nevertheless, the said T, knowing the said gelding to be within his inn, the same day and place, did so negligently keep said gelding, that the said gelding, for want of safe keeping thereof, by the said T, and his servants, went forth and wandered from the said inn; whereby the said plaintiff not only lost the use and profit of the said gelding in going on his said journey, in doing necessary and important business, but the same thereby remained undone; and the said plaintiff expended and laid out divers sums of money, not only by reason of the want of his said horse, but also the said plaintiff always, from the said day &c., lost the use and benefit of his said gelding. And the said T hath not delivered to the said plaintiff, his said gelding, although the said T, on &c., at &c., was thereto requested, but hitherto hath refused, and still doth refuse so to do, or make him any satisfaction for the same &c. *Mod. Ent.* 144.

For the rights and liabilities of innholders, and of travellers and guests. See the Tract on that subject in the Law Summary, p. 373.

1st COUNT. — *For deceit in the delivery of goods sent to the East Indies, pursuant to an order, which goods were accepted by the defendant without the knowledge of the nature and quality of the goods, which by the order, were to be the best of different sorts, but some were of an inferior quality, and some damaged by improper package, whereby the plaintiff was forced to sell at a less price, &c.*

For that on &c., at &c., in consideration that the plaintiff at the request of the said D, would buy of the said D certain goods &c., pursuant to an order, in that behalf, to be sent to Bengal &c., for the purpose of sale, the said D then and there undertook and faithfully promised the plaintiff to fulfil the said order with the best goods of the sundry sorts therein specified, all in such marketable condition as to reach Bengal aforesaid, in a perfect saleable state, sea and ship hazard excepted; and the said plaintiff, confiding in the said promise and undertaking of the said D, afterwards on &c., at &c., did buy such goods as aforesaid of the said D. And although the said D afterwards, on &c., at &c., did deliver unto the said plaintiff certain goods, packed as and for the goods specified in the said order, and as pursuant to the said order, which were then and there accepted by the

plaintiff, not then knowing the true nature, quality and condition of the same, and although said goods afterwards, viz. on &c., arrived at said Bengal, and were there unshipped and delivered, and though the same have long since been paid for by the said plaintiff, viz. at &c. Yet the said D did not regard his said promise and undertaking, but deceived the plaintiff in this, viz., that the said D, did not by the said goods so shipped by him as aforesaid, or otherwise, fulfil the said order with the best goods of the sundry sorts therein specified, all in such marketable condition as to reach Bengal in a perfect saleable state, sea and ship hazard excepted, but omitted and neglected so to do, and therein failed and made default; and, on the contrary thereof, the plaintiff saith that the said goods, were not at the time of the delivery thereof, the best goods of the sundry sorts, specified in the said order, nor were all the said goods, then in such marketable condition as to reach Bengal, in a perfect saleable state, sea and ship hazard excepted; but, on the contrary, a great part of the said goods, which had been delivered to the plaintiff, as certain cloth, commonly called *Ladies' Cloth*, pursuant to the said order, were not goods of that denomination and species, but were goods of another and different species and of an inferior quality and value, and were unmarketable goods; and divers other large quantities of the said goods were also, at the time of the said delivery thereof, of an inferior quality and value, than were so in that behalf ordered as aforesaid; and many of them were so old and decayed, and others were so damp, wet, and unseasoned, and were severally so loosely, carelessly and improperly packed and covered, as not to reach Bengal aforesaid, in a perfect saleable state, but by reason of such defect and imperfections in the same as aforesaid, and of such improper package and covering thereof as aforesaid, and not by or through any sea or ship hazard, reached Bengal aforesaid, damp, spotted, stained, discolored, rotten, motheaten, and in holes, and in various other respects, damaged, and in an unsaleable and unmarketable state and condition, were unshipped and delivered, to wit, at &c.; by reason whereof one A B, who would otherwise have bought and taken the said several goods which so reached and arrived at Bengal in such unsaleable and unmarketable state and condition, as aforesaid, at an advanced price, and upon certain very beneficial and advantageous terms in favor of the said plaintiff,

refused to take or purchase them, and the said plaintiff was ultimately forced and obliged to sell and dispose of the same to other persons, for a much less sum of money than otherwise they would have produced to him, and at a loss amounting in the whole to a large sum of money, to wit, the sum of &c. at &c.

To deliver marketable goods, &c.

2d Count.—And for that on &c., at &c., in consideration that the plaintiff, at the like request of the said D, had then and there bargained with the said D, for the purchase of, and to pay him for, certain other goods and merchandises, consisting of cloths, ratteens, kerseymeres, and cottons of various sorts, pursuant to a certain order in that behalf, to be sent to Bengal in the East Indies, for the purpose of sale there, the said D promised the plaintiff, to fulfil the last mentioned order, with the best goods of the sundry sorts therein specified, all in such marketable condition, as to reach said Bengal in a perfect saleable state, sea and ship hazard excepted; and though certain goods afterwards, to wit, &c., were shipped by the said D, for said Bengal, as and for the goods specified in the last mentioned order, and in fulfilment of the same; and though such goods afterwards and before the purchase of this writ, arrived at said Bengal, and were there unshipped and delivered; and though the same have been long since paid for by the plaintiff, to wit, at &c.; yet &c. *as before.*

3d Count.—And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said D, had then and there bought of, and bargained and agreed with the said D, for certain other goods and merchandizes, consisting of cloths, ratteens, kerseymeres, and cottons of various sorts, to be sent to said Bengal, for the purpose of sale there, the said D promised the plaintiff to furnish and supply him with such goods last mentioned, and that the same should be good and marketable goods, and properly packed; and though certain goods were thereafterwards, *viz.* on &c., delivered by the said D, unto and for the plaintiff, as and for the goods last mentioned, and though such goods were then and there accepted and received by the plaintiff, who was then ignorant of the real quality and condition thereof; and though the said last mentioned goods, afterwards, and before the purchase of this writ, arrived at said Bengal, and were there unshipped and delivered, as and for said goods, so bought and bargained, as last men-

tioned, to wit, &c. ; yet the said D. did not regard his last mentioned promise, but thereby craftily deceived the plaintiff in this, that the last mentioned goods were not, at the time of delivery thereof, good and marketable goods, nor properly packed, but, on the contrary, were bad goods, and of an inferior sort and value, than the goods so as last aforesaid bought and bargained for by the plaintiff, and unmarketable, and were so loosely and improperly packed, as, by reason thereof, on arrival at said Bengal, to be very much soiled, discolored, wet, torn and damaged ; whereby the plaintiff suffered a loss of a large sum of money, to wit, &c. *2 Went. 143.*

Add a count on a promise "to furnish and supply plaintiff with goods to be packed in a merchantlike manner, and in such marketable condition, as to reach Bengal aforesaid, in a perfect saleable state, sea and ship hazzard excepted," and the common money counts.

The conclusions of these counts, except the 1st, have been varied considerably from the originals, which were extremely prolix, and alleged special damage.

NOTE. There are many cases, where it is optional with the plaintiff, to declare in Assumpsit, as on a promise, or in Case, for a tort. For instance, in many cases of negligence or non-feasance, the plaintiff may declare in Case, for the injury he has sustained by the defendant's omission to perform his duty ; or he may declare in Assumpsit, on the implied promise, which is raised by law in every one, to perform what his office, occupation, trade, or business naturally leads the public to expect of him, or which public policy requires of every one in such circumstances. Thus, the plaintiff may declare *in assumpsit* against a carrier for a breach of the promise raised by law, or in case, for negligence, whereby the plaintiff's goods are lost. So for deceit, in the sale of goods, the plaintiff may declare on a promise, expressed or implied, in Assumpsit, or in Case, for the deceit whereby the plaintiff is defrauded. But whatever the plaintiff's choice may be, he should take care that his declaration should be made agreeably to the principles of the form of action, which he adopts. It should be borne in mind, that, in Assumpsit, a promise is always alleged, the breach of which is the gist of the action. But, in Case, there is no necessity or propriety in alleging a promise, for the gist of the action, in such cases, is either negligence or deceit, &c. There are some declarations, however, which are drawn in so ambiguous a manner, that they may be considered either in Case or Assumpsit. Thus a promise is alleged in the beginning of the declaration, and afterwards a non-performance is alleged with a statement, that the defendant has deceitfully imposed on the plaintiff, something different from what was contracted for, by reason of which the plaintiff suffers certain special damages. Whether this mode of declaring may not, in strictness, be liable to an exception for duplicity may be worth inquiry. The object of the declaration is to make the plaintiff's grievance appear, and let the defendant know what he has to answer. Now of what does the plaintiff complain in such a declaration ? Is the breach of promise the gist of the action, or the imposition practiced on him ? Both are alleged in the declaration, with so much certainty, that the plaintiff might offer evidence and recover on

either, alone. In this case how can the defendant plead? If he pleads *not guilty*, it will be bad on special demurrer, being no proper answer to the breach of contract; if he pleads *non assumpsit*, it is no answer to the deceit. It would therefore be much better to draw a line of distinction between the two forms of action, and compel the plaintiff to frame his declaration accordingly.

For deceit in warranty of a mare, consideration partly paid.

1st COUNT. — *In consideration plaintiff would buy, &c.*

For that whereas the said D, on &c., at &c., offered to sell to the plaintiff, a certain mare of the said D, and thereupon, then and there, in consideration that the plaintiff, at the special request of the said D, would buy of the said D the said mare, at a large price or sum, to wit, \$100, to be paid by the plaintiff to the said D, upon request, the said D promised the plaintiff, that the said mare was sound; and the plaintiff in fact saith, that he, confiding in the said promise of the said D, then and there, at the special request of the said D, did buy of the said D, the said mare, at the price or sum of \$100, and did then and there pay to the said D, the sum of \$70, part of the said sum of \$100, and did then and there promise the said D to pay him the further sum of \$30, residue of the said sum of \$100, upon request, yet the said D did not regard his promise aforesaid, but craftily and subtilly deceived the plaintiff in this, that the said mare, at the time of making the promise aforesaid, was not sound, but on the contrary thereof, was unsound, and was afflicted with a certain malady or disease called the windgalls, to wit, at &c.; whereby the said mare, then and there, became of no use or value to the plaintiff.

For the doctrine of express and implied warranties on sales. See Law Summary, p. 101.

For warranties on the sale of horses. See Law Summary, p. 107.

2d COUNT. — *In consideration plaintiff had bought, &c.*

And for that the said D, thereafterwards, to wit, the day and year aforesaid, in consideration that the plaintiff, at the like request of the said D, had bought of the said D, a certain other mare of the said D, at and for a certain other large price or sum, to wit, the sum of \$100, and had then and there paid the said D the sum of \$70, in part of the last mentioned sum of \$100, and had then and there promised to pay the said D the further sum of \$30, the residue of the said last mentioned sum of \$100, upon request, promised the plaintiff, that the said last mentioned mare was

sound ; yet the said D did not regard his promise last aforesaid, but craftily and subtilely deceived the plaintiff in this, that the said last mentioned mare, at the time of making the last mentioned promise, was not sound, but then was unsound ; whereby the last mentioned mare became of no use or value to the plaintiff. *Add the money counts. Doug. 18, Stewart v. Wilkins.*

NOTE. In that case, it was held, that Assumpsit is the proper form of action where there is an express warranty. Ld. Mansfield also observes, that, "selling for a sound price may be a ground for an assumpsit, but, in such case, it ought to be laid that the defendant knew of the unsoundness." It should appear also, the plaintiff had no opportunity to examine. See Law Summary, p. 102.

For deceit on warranty, the whole consideration being paid.

1st COUNT. — *In consideration the plaintiff would buy, &c.*

For that, on &c., at &c., in consideration that the plaintiff *would* buy of the said D, at his special request, a certain horse, at and for a certain large sum of money, to wit, the sum of \$—, the said D promised the plaintiff, that the said horse was sound ; and the plaintiff in fact saith, that he, confiding in the said promise of the said D, thereafterwards on the same day, did buy the said horse of and from the said D, at and for the said price or sum of money ; yet the said D did not regard his promise aforesaid, but craftily and subtilely deceived the plaintiff in this, that the said horse, at the time of making the said promise, and also at the time of said sale thereof, was not sound, but was then and there unsound ; and by reason thereof, the said horse became and was of no use or value to the plaintiff.

2d COUNT. — *In consideration the plaintiff had bought, &c.*

And for that, on &c., at &c., in consideration that the plaintiff, at the like request of the said D, *had* then and there bought of the said D, a certain other horse *and had then and there paid to said D, a certain other large sum of money, to wit, \$—, for the same*, the said D promised the plaintiff, that the last mentioned horse was sound ; yet the said D did not regard his last mentioned promise, but thereby craftily and subtilely deceived the plaintiff in this, that the last mentioned horse, at the time of making said promise and of said sale thereof, was not sound, but was then and there unsound ; and by reason thereof, became and was of no use or value to the plaintiff. 2 *Wentl.* 126. F. BULLER.

Add a third count, like the second, omitting the parts in italics, and the money counts.

For deceit in warranting a mare sound and free from faults, &c.

For that, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, would buy of the said E, a certain mare, for a certain price or sum of money, to wit, \$—, the said E promised the plaintiff, that the said mare was then and there sound and *free from faults*, and that the same would go well in a chaise; and the plaintiff in fact saith, that he, confiding in the said promise of the said E, did, on &c., at &c., buy the said mare of the said E, at and for the price aforesaid, and did then and there pay the same to the said E for the same; yet the said E did not regard his said promise, but thereby craftily and subtilly deceived the plaintiff in this, that the said mare, at the time of the said sale thereof and at the time of making said promise, was not sound *nor free from faults*, nor would the same go well in a chaise, but on the contrary thereof, was then and there unsound *and faulty*, and would not go well in a chaise, but was then and there restive, unruly, and ungovernable, when so used; whereby the said mare then and there became and was, and still is, of no value to the plaintiff. 2 *Went.* 198. V. LAWES.

Add a second count, like the first, omitting the parts in italics; also separate counts upon separate promises, that "the mare would go well in a chaise," "was not restive," "was sound," and the money counts.

For deceit in warranty of a cow and calf.

1st COUNT. — *For deceit in a cow and calf.*

For that the said E, on &c., at &c., in consideration that the plaintiff, at the special request of the said E, would buy of the said E a certain cow and calf of the said E, for a large sum of money, to wit, \$—, promised the plaintiff, that the said cow had then newly calved, and that the said calf was the calf, which had been calved by the said cow, and that the said calf was only three weeks old; and the plaintiff in fact saith, that he, relying on the said promise of the said E, did then and there buy of the said E, the said cow and calf, at and for a large sum of money, to wit, \$—; and the plaintiff avers, that the said cow, at the time of his purchasing the same of the said E, had not then newly calved, but, on the contrary thereof, had calved above five months before that time, and that the said calf was not the calf, which had been calved by the said cow, but on the contrary thereof, was the calf of some other cow.

2d COUNT. — For deceit in calf, &c.

And for that the said E, on &c., at &c., in consideration that the plaintiff, at the like request of said E, had agreed to buy a certain other cow and calf of him, promised the plaintiff that the said last mentioned calf, was the calf of the last mentioned cow; and the plaintiff in fact saith, that the last mentioned calf, at the time of his buying thereof, as aforesaid, was not the calf of the last mentioned cow, but on the contrary thereof, was the calf of some other cow.

3d COUNT. — For deceit in cow, &c.

And for that, on &c., at &c., in consideration that the plaintiff *would* buy of the said E, at his like request, a certain other cow, at and for a certain other large sum of money, to wit, \$—, promised the said E, that the last mentioned cow was sound; and the plaintiff in fact saith, that confiding in the last mentioned promise of the said E, he did then and there buy the last mentioned cow of the said E, at and for a large sum of money, to wit, \$—; yet the said E did not regard his last mentioned promise, but thereby craftily and subtilly deceived the plaintiff in this, that the last mentioned cow, at the time of making the last mentioned promise, was not sound, but was then and there unsound and rotten, and by reason thereof, was of no use or value to the plaintiff. 2 *Went.* 203. F. BULLER.

Add another count in consideration the plaintiff had bought, and the money counts.

For selling plaintiff unmerchantable goods and badly packed.

For that, on &c., at &c., in consideration that the plaintiff, at the request of said E, had then and there bought of, and bargained with the said E, for certain goods and merchandises, consisting of cloths, ratteens, kerseymers, and cottons of various sorts, to be shipped to Bengal in the East Indies, for the purpose of sale there, the said E promised the plaintiff to furnish him with such goods of good and merchantable qualities, and well packed for such shipment; and the plaintiff avers, that the said E afterwards delivered to the plaintiff, and the plaintiff accepted of certain goods, packed as and for said goods, bought and bargained for as aforesaid, which goods, were accordingly shipped to and arrived at Bengal aforesaid, for sale; yet the said E did not regard his said promise, but craftily thereby deceived the plaintiff in this, that said goods so delivered by said E

were not, at the time of delivery, of good and merchantable qualities or well packed, but were of inferior and bad qualities and unmerchantable, and so loosely and badly packed, that they arrived at said Bengal, wet, soiled, torn, motheaten and damaged, and thereby the plaintiff sustained a loss on the sale thereof, of a large sum of money, to wit, &c.

For deceit in delivering bad cider for good.

For that on &c., at &c., in consideration that the plaintiff, at the special request of the said E, would buy of the said E, divers, to wit, five hogsheads of cider, at a large price, to wit, &c., to be therefor paid by the plaintiff to said E, the said E promised the plaintiff, to send and deliver him the said five hogsheads of cider; and the plaintiff in fact says, that he, relying on the said promise, did then and there buy of the said E, five hogsheads of cider, and did then and there pay him for the same at the price aforesaid; yet the said E did not send and deliver to the plaintiff the said five hogsheads of cider, but on the contrary, on &c., at &c., did fraudulently and deceitfully send and deliver to the plaintiff, five hogsheads of cider, of a quality and goodness very inferior to the said five hogsheads, purchased by the plaintiff as aforesaid; by reason whereof the same became, and was of no use or value to the plaintiff, contrary to the promise of said E, &c. 2 *Went.* 204. GRAHAM.

For deceit in delivery of hops.

1st COUNT. — *On hops sold by sample and warranted.*

For that, on &c., at &c., in consideration that the plaintiff would buy of the said D, at his special request, five pockets of hops, at a certain price, to wit, &c., the said D promised the plaintiff, to deliver him the same, and that the said hops should all be of like goodness and quality, with a certain sample of the said hops, contained in each of the said pockets, and then produced and shown, by the said D, to the plaintiff; and the plaintiff avers, that he, confiding in said promise, afterwards, to wit, &c., bought the said five pockets of hops, of the said D, at the price aforesaid; and the said D, afterwards, to wit, &c., delivered to the plaintiff five pockets of hops, as and for hops of like goodness and quality, with the respective samples, so as aforesaid produced and shown to the plaintiff; yet the said D did not regard his said promise, but thereby deceived and defrauded the plaintiff in this respect, that the hops contained in

each of the five pockets, so delivered to the plaintiff, at the time of delivery thereof to the plaintiff, were not hops of like goodness and quality, with the respective samples, but were much inferior, and were bad, damaged, and unsaleable hops, whereby the plaintiff lost the benefit of selling the same, and gaining large profits, &c.

2d COUNT. — *On hops sold as good, sound, and merchantable.*

And for that, on &c., at &c., in consideration that the plaintiff would buy of the said T, at his request, five other pockets of hops, at a certain price, to wit, &c. the said T promised the plaintiff to deliver to him the same, and that the same should be good, sound and merchantable hops; and the plaintiff avers, that he, confiding in said T's promise aforesaid, afterwards, to wit, on &c., at &c., bought the last mentioned hops of the said T, at the price aforesaid; and the said T afterwards, to wit, on &c., at &c., delivered to the plaintiff, five pockets of hops, as and for good, sound and merchantable hops; yet the said T did not regard his said promise, but thereby deceived the plaintiff in this respect, that the said hops, at the time of the delivery thereof to the plaintiff, were not good, sound and merchantable hops, but, on the contrary, were bad, damaged and unmerchantable, whereby the plaintiff lost the benefit of selling or using the same, and gaining large profits, &c. *Parkinson v. Lee*, 2 East's Rep. 314.

NOTE. It was decided in this case, that, where there is a latent defect in the commodity, unknown to the seller, and he sells with warranty of goodness equal to a sample (*as in the first count*), he is not liable on such warranty; nor will the law raise an implied promise in such case, that the commodity is sound and merchantable (*as in the second count*), though a fair price be given for the same; since no fraud is imputable to the seller. In order to bind the seller, there should be an *express* warranty of the soundness; and an express warranty extends to all defects, known and unknown to the seller. Doug. 18. *Stuart v. Wilkins*. (MSS.)

For the general doctrine of warranties on sales, — See Law Summary, p. 101.

Assumpsit in the nature of Case for negligence.

Against attorney for negligence in suing out a scire facias; various counts, &c.

Also, for that whereas, on &c., one T P, then resident at P aforesaid, was justly indebted to the plaintiff in another

sum of \$195,06, on a certain other cause of action before that time accrued to him, and whereas the said P, being so indebted, the plaintiff for the recovery of his said debt, afterwards, to wit, on the same day, sued out of the office of the clerk of our court of C. P. for our county of C. our other writ of attachment, in due form of law, directed to the sheriff of our said county of C or his deputy, and whereas the plaintiff afterwards on the same day, delivered the same writ to one E M, then a deputy sheriff under J W, Esq. then sheriff of our said county of C, to be by him, the said M, in his said capacity duly executed, served and returned, according to the precept thereof; and whereas the said M, in his said capacity, thereafterwards, to wit, on &c., by virtue of said last mentioned writ, for want of any goods or estate of the said P, to be found by said M in said county of C, took the body of the said P; and whereas one N S, then and there by his bond to the said J W, Esq., then sheriff of our said county of C, under the hand and seal of him, the said S, duly executed, became and was bail and surety for said P upon said last mentioned writ, not only for the appearance of said P at the court to which the same was returnable, and his answering to the plaintiff in his plea therein declared, but also for the said P's abiding the final judgment thereon and not avoiding; and whereas the plaintiff, thereafterwards, according to law, entered of record and prosecuted his action last mentioned against the said P, and such proceedings were therein had, that the plaintiff by the consideration of our justices of our S. J. C., holden at P, within our county of C aforesaid, and for our counties of C and O, on &c., recovered judgment against the said P for the sum of \$217,87 damages, and costs of suit taxed at \$35,59; and whereas the plaintiff afterwards, on &c., purchased out of the office of the clerk of our court last mentioned, our writ of execution on the judgment last mentioned, in form by law prescribed, and directed to the sheriff of our said county of C, or his deputy, and thereafterwards, on the same day, delivered the same writ of execution to one J G, then a deputy under R H, Esq., then sheriff of our said county of C, to be by him levied and returned; and whereas the said G, in his said capacity, made a return of *non est inventus* on the last mentioned writ of execution issued against the said P on the last mentioned judgment, and the same remains wholly unsatisfied and unreversed; and whereas the said P did not appear at our said court, when and where

the last mentioned writ of attachment was returnable, nor did he answer to the plea of the plaintiff, therein declared against him, and he has not in any way abided or performed the judgment last mentioned of our said court thereon, but hath avoided; and whereas the said S was obliged by law to satisfy the last mentioned judgment out of his own estate, and the plaintiff was entitled to recover judgment against him, the said S, for the aforesaid damages and costs recovered as aforesaid against the said P, amounting to the sum of \$253,46, with additional damages and costs; and the plaintiff at said P, to wit, at said I, on &c., was about to sue according to law our writ of scire facias against the said S, bail as aforesaid, for recovery of satisfaction of said judgment out of the estate of said S, with additional damages and costs; and the said H then and there was a practising attorney at law, and the said H then and there, in consideration that the plaintiff, at the special request of the said H, had retained and employed him, the said H, and had promised to pay him a reasonable fee and reward in his said capacity of attorney, promised the plaintiff that he, the said H, would without delay sue out of the office of our clerk of our S. J. C. a writ of scire facias, against the said S, the bail aforesaid, for the recovery of the amount of the said damages and costs adjudged as aforesaid to the plaintiff, with additional damages and costs, out of the proper estate of the said S, and would use all necessary care and fidelity in the prosecution of the said writ of scire facias to final judgment; yet the said H, not regarding his last mentioned promise and undertaking, did not sue out and prosecute the said writ of scire facias to final judgment, but wholly neglected and omitted so to do; and the plaintiff avers, that more than one year has elapsed since the entering up of the aforesaid final judgment against the said P, the principal in said suit; and the plaintiff, by reason of the last aforesaid negligence and misfeasance of said H, has wholly lost all benefit of said bail, and has utterly lost his damages and cost aforesaid: —

Also, for that whereas the said P, on &c. aforesaid, was justly indebted to the plaintiff in another sum of \$195,06 on a certain other cause of action, before then accrued to the plaintiff; and whereas said P being so indebted, the plaintiff for the recovery of said debt, afterwards, to wit, on the same day, sued out of the office of our clerk of our Court of C. P. for our county of C aforesaid, one other attach-

ment, in due form of law, directed to the sheriff of our said county of C, or his deputy ; and whereas the plaintiff afterwards, on the same day, delivered the same writ to one E. M., then a deputy sheriff under J W Esq., then sheriff of our county of C, to be by him, the said M, in his said capacity, executed, served and returned according to the precept thereof ; and whereas the said M, in his said capacity, thereafterwards, to wit, on &c., by virtue of said last mentioned writ, for want of any goods or estate of the said P, to be found by said M in said county of C, took the body of said P ; and whereas the said M, in his said capacity, so having taken the body of the said P, afterwards, on the same day of &c. aforesaid, took and accepted one N. S. solely as bail, and surety for the said P, upon said last mentioned writ, not only for the said P's appearance at the court, to which the same writ was returnable and for answering to the plaintiff in his plea therein declared, but also for the said P's abiding the final judgment thereon and not avoiding, and did thereupon then and there permit the said P to go at large ; and whereas the said S, at the time when he became bail as aforesaid, and ever since has been, and now is, poor and insolvent, and not a sufficient surety in this behalf, and was not then, and hath not at any time since, been able to satisfy the said judgment out of his, the said S's, own estate ; and whereas the plaintiff thereafterwards, according to law, entered and prosecuted his last mentioned action against the said P, and such proceedings were therein had, that the plaintiff by the consideration of the justices of our S. J. C., holden at P, on &c., recovered judgment against the said P for the sum of \$217,87 damages, and costs of suit taxed at \$35,59 ; and whereas the plaintiff afterwards, on &c., purchased out of the office of the clerk of our court last mentioned, our writ of execution on the judgment last mentioned, in form by law prescribed, and directed to the sheriff of our county of C aforesaid, or his deputy, and afterwards, on the same day, delivered the same writ of execution to one J. G., then a deputy under R. H. Esq., then sheriff of our last mentioned county, to be duly levied and returned ; and whereas the said G, in his said capacity, made a return of *non est inventus* on the last mentioned writ of execution, and the judgment remains wholly unsatisfied and unreversed ; and whereas the said P did not appear at our said court, when and where the last mentioned writ was returnable, nor did he answer to the plea of the plaintiff there-

in declared against him, and he has not in any way abided or performed the last mentioned judgment of our court aforesaid thereon, but has avoided ; and whereas by the said misfeasance of the said M, in his said capacity, and by his said negligence of the duty of his said office in permitting the said P to go at large as aforesaid, without taking sufficient bail as aforesaid, the plaintiff entirely lost the sums recovered by him by the last mentioned judgment ; and whereas the said J W, Esq., then sheriff as aforesaid, was by reason of the premises, on &c., liable and obliged by law to pay the said sums last mentioned to the plaintiff, with other due damages ; and the plaintiff, at said P, on the day last mentioned, was about to sue according to law, an action at law, against the said W, for the recovery of said sums with other due damages, to the plaintiff accrued by reason of the last mentioned misfeasance and negligence of the said deputy of the said W, and the said H then and there was a practising attorney at law, and the said H, then and there, in consideration that the plaintiff, at the special request of the said H, had retained and employed him, and had promised to pay him a reasonable fee and reward in his said capacity of attorney at law, promised the plaintiff that he, the said H, would without delay, sue in behalf of the plaintiff said last mentioned action at law, and would use all necessary care and fidelity in the prosecution of the same ; yet the said H, not regarding his last mentioned promise and undertaking, did not sue and prosecute the said last mentioned action against the said W, but wholly neglected and omitted so to do ; and the plaintiff avers, that four years have elapsed since the cause of the last mentioned action against the said W arose ; and the plaintiff, by reason of the last mentioned negligence and misfeasance of the said H, has wholly lost all benefit of the debt and damages he was entitled to recover against the said W as aforesaid.

Also, for that whereas the said P, on the same day of &c. was justly indebted to the plaintiff in another sum of \$195.06, on a certain other cause of action before then accrued to him ; and whereas said P being so indebted, the plaintiff for the recovery of his last mentioned debt, afterwards, to wit, on the same day, sued out of the office of the clerk of our court of C. P. for our county of C, our writ of attachment in due form of law, directed to the sheriff of our county of C aforesaid, or his deputy, commanding them, among other things, to attach the goods or estate of said P

to the value of \$400; and whereas the plaintiff thereafterwards, on the same day, delivered the same writ to one E M, then a deputy under J W, Esq., then sheriff of our county of C, to be by him, the said M, duly executed, served, and returned according to the precept thereof, and then and there gave a written direction on the back of said writ, to the said M to make special service of said writ, by attaching the property of said P, sufficient to satisfy the judgment which the said plaintiff might recover in said action against the said P; and whereas there were then and afterwards, and before the return of said writ last mentioned, divers goods and estate of said P, of the value of \$400, within the precinct of the said sheriff of our county of C, to wit, at said P, which the said M could, might, and ought to have attached by virtue of said last mentioned writ, whereof the said M then and there had notice; and whereas the said M, so being a deputy as aforesaid, not regarding the duty of his said office, but contriving to injure the plaintiff and to deprive him of the means of satisfying the judgment he might recover against the said P in the action last aforesaid, did not at any time before the return of said last mentioned writ, attach any goods or estate of said P by virtue of said writ, but returned thereon that he, the said M, had taken the body of said P and held him to bail; and whereas the plaintiff afterwards, according to law, entered and prosecuted his said action thereof against the said P, and such proceedings were therein had that the plaintiff by the consideration of the justices of our S. J. C., holden at &c., on &c., recovered judgment against said P for the sum of \$217,87 damages, and cost of suit taxed at \$35,59; and whereas the plaintiff afterwards, on &c. aforesaid, sued out of the office of the clerk of the court last mentioned, our writ of execution on the same judgment, in form by law prescribed, and directed to the sheriff of our said county of C, or his deputy, and thereafterwards, on the same day, delivered the same writ of execution to one J. G., then a deputy under R H, Esq., then sheriff of our county last mentioned, to be levied and returned; and the said G, in his said capacity, was not able to find in his said precinct the goods, estate, or body of said P, on which said execution could be levied, and thereafterwards, on &c., duly returned the same writ of execution, according to the precept thereof, into the clerk's office last mentioned *wholly unsatisfied*; and whereas, by the aforesaid refusal and neglect of said M, in his said ca-

capacity to attach the goods and estate of said P to the amount aforesaid, the plaintiff utterly lost his last mentioned damages and costs, and the said last mentioned judgment remains wholly unsatisfied and unreversed; and whereas the said H, on &c., at said P, to wit, at said I, was a practising attorney at law, and the plaintiff was then and there about to sue an action at law against the said W, sheriff of our said county of C, for the recovery of damages by the plaintiff sustained, by reason of the last mentioned negligence and misdoing of the said M in his said capacity; and the said H then and there, in consideration that the plaintiff at the special request of said H, had retained and employed him, and had promised to pay him a reasonable fee and reward, in his said capacity of attorney, undertook and promised the plaintiff, that he, the said H, would without delay sue an action at law against the said W in his said capacity, for the recovery of the damages by the plaintiff, in this behalf sustained, and would use all necessary fidelity and care in the prosecution of the same; yet the said H, not regarding his last mentioned promise and undertaking, did not sue and prosecute the action last mentioned; and the plaintiff avers, that four years have elapsed, since the cause of action last mentioned arose; and the plaintiff, by reason of the aforesaid negligence and misfeasance of the said H, has wholly lost all benefit of the damages, that had accrued to him, by reason of the last mentioned cause of action, against the said W, in his said capacity.

Declaration in Assumpsit for supplies furnished to a pauper.

Summon the inhabitants of the town of A &c. to answer to the inhabitants of the town of B &c. in a plea of trespass on the case, for that whereas C D on &c. had fallen into distress within the said town of B, the plaintiffs then and there furnished, provided and laid out and expended the various articles and sums of money, contained in the annexed account, for the relief and comfort of the said C D; and the plaintiffs aver, that at the said time, the said C D had his lawful settlement within the town of A; that the said C D at the said time, had fallen into distress within the said town of B, and then and there stood in need of immediate relief; and that the said articles and sums of money, specified in the said account, were then and there necessary for the immediate relief and comfort of the said C D; *of which said several premises, the inhabitants of the town of A, with-*

*in three months next after the said articles and sums of money were so furnished, provided and laid out and expended, as aforesaid. had notice, viz. on &c., at &c.,** whereby the said inhabitants of the town of A became liable, and in consideration thereof, then and there promised the plaintiffs to pay them the same sum on demand ; yet though requested, &c.

Or the following may be substituted for the part in italics, where the fact is so, and no more.

And the plaintiffs aver, that within three months from the time when the said articles and sums of money were so furnished, provided and laid out and expended, as aforesaid, viz. on &c., at &c., the said inhabitants of the town of A had notice, that the said C D had fallen into distress within the said town of B, and stood in need of immediate relief, &c.

Or the count may be in Debt, thus : —

To answer &c. in a plea of debt, for that whereas one C D, (*as in the preceding form, to the mark**) whereby an action hath accrued to the said plaintiffs, to recover of the said inhabitants of the town of A the price of the said articles, and the said several sums of money, amounting in the whole to the sum of \$—; yet, though requested, the said inhabitants of the town of A have never paid the said sum of \$—, but still owe and unjustly detain the same.

NOTE.—The above declaration is drawn with reference to the statute of 1793, ch. 59, § 13, re-enacted in substance in the Rev. Stat. ch. 46, sect. 13.

C A S E .

1. *Of the nature of an action on the Case.*

TRESPASS on the Case is the form of action, usually resorted to for wrongs done to a man's person, reputation, goods or estate, without direct force. See 2 Bur. 2345 ; 3 T. R. 63. It therefore comprehends under it, the actions of Trover, Slander, Deceit, Malicious Prosecution, Conspiracy, Nuisance, &c., upon each of which a few remarks will be made, under these respective heads.

Case lies either for negligence or nonfeasance, that is, the omission of what one is bound by law to perform ; misfeasance, that is, an improper performance of what one has a right to do in a proper manner, or of what one has undertaken, or is bound by law to perform ; or malfeasance, that is, doing what is illegal, or what one has no right to do ; by either of which a consequential injury results to another. In either of these cases, the party injured may maintain an action on the case, for the wrong.

Assumpsit also is sometimes called an action on the case on promises ; but the expression, *action on the case*, without more, is commonly understood, as before explained.

As the cases, in which this form of action supplies a proper remedy, are infinitely various, a few only will be enumerated, in addition to the general heads before mentioned, and to which a reference must be made for further instances. This action lies against an attorney, for any neglect in the management of a suit, in consequence of which his client's interest is injuriously affected ; and against a surgeon or apothecary, by whose neglect or ignorance a person suffers in his health, or is not cured. And in all analogous cases, where a man fails in the performance of any act, from a want of that ordinary skill, which is expected in every one who holds himself out to the public as a regular practitioner in any profession or trade, this action may be maintained ; as against a farrier or blacksmith, for laming a horse in shoeing him. 8 East, 348.

It is a proper remedy to recover damages, where unwholesome provisions are sold. So where an unwholesome or noisome trade is carried on to the injury of *individuals, in some special manner*. So for keeping dangerous animals, and suffering them to go at large, or not properly securing them, in consequence of which they do mischief ; as, if a man keeps a dog used to bite, or a savage bull, *after notice or knowledge of its disposition*, he will be liable in this action for all damages to the party injured. But lions, tigers, bears, &c. a man must keep securely at his peril, being animals naturally savage. *Ld. Raym. 608.* Voluntarily to turn one loose, if any lives were lost in consequence, would be murder. However, it seems from *Brock v. Copeland*, 1 Esp. R. 203, that a man may lawfully keep a dog for the protection of his house or yard ; and if after the dog is let loose at night, any one should

imprudently enter the yard after it was shut up, the owner would not be answerable for damages. This action furnishes a proper remedy against a master for any tortious act of his servants, apprentices, deputies, in the course of their employment; and generally, in cases where the master is liable for the tortious acts of his servant, and the servant would be liable to an action of trespass *vi et armis*, Case is the proper action against the master, though Trespass *vi et armis* may be brought against a sheriff for the act of his deputy. 3 Wils. 309.

In an action on the case against several partners for the tortious or negligent act of the servant, it is no valid objection, that all the partners are not joined in the suit. *Mitchell v. Tarbutt*, &c. 5 D. & E. 649.

Case lies, for any misconduct in his office, against any public officer, acting *ministerially*; as against a sheriff for an escape suffered either by himself or his deputy; and that whether negligent or voluntary; or for a false return of a writ, execution, &c.; or for an irregular or informal execution of any meane or final process; or for suffering a rescue to be made. This action also may be brought against the rescuers. 3 Lev. 46; 2 Cro. 289; 1 Salk. 18; 1 T. R. 509; 2 T. R. 667.

It lies against a justice of the peace for refusing bail, where he ought to grant it.

So it may be brought against an officer for refusing bail. Cro. Car. 196. False imprisonment will not lie. 2 Mod. 32.

It lies for any injuries done or suffered to property, entrusted, delivered, or deposited with another for any lawful purpose whatever; as against an innkeeper, carrier, &c. where there is either an actual or implied negligence, or breach of trust, on the part of the bailee; or where the policy of the law requires that such persons should be liable for losses, happening to the bailments while in their possession. 1 Salk. 282; 2 Cro. 189.

It is the proper form of action to be used in cases of *crim. con.*; harboring an apprentice; enticing away a servant; seducing a daughter or servant, &c.

Trespass on the case is the proper remedy for infringing copyrights, patents, &c. For *direct* injuries to *real corporeal property*, in *possession*, Trespass is the proper remedy, but where the property is *incorporeal*, or is in reversion, or the injury is consequential, Case is the proper remedy. Thus Case lies for obstructing ancient lights. 1 Lev. 122. It lies also by a reversioner against the tenant or a stranger, for cutting down trees, &c. 3 Lev. 131. Case lies for not repairing fences, whereby cattle get into the plaintiff's land. 1 Salk. 335.

In addition to these general heads, Case is sometimes pointed out as a proper remedy, by particular statutes, for the violation of their provisions and enactments, to recover the penalties; and though where an action of debt, or on the Case, is mentioned, the latter words were probably intended to designate an action of Assumpsit, on an implied promise; yet it has been held, that an action on the Case, as for a tort, may be maintained. 7 T. R. 36.

2. Some particular cases where an action on the Case lies.

If a bank or other corporation should refuse to transfer stock, this action might be maintained. Doug. R. 524.

When goods are delivered to a wharfinger or carrier, and they are lost, a special action on the Case is the proper remedy, and not Trover. 5 Bur. 2827.

Where a commission of bankruptcy is maliciously sued out, the party injured may maintain this action. 3 B. M. 1419.

If an officer should seize goods without probable cause, this action might be maintained by the injured party. Bunb. 80.

This action will also lie, if a man does not repair the wall of his house, whereby his privy annoys his neighbors; so if the owner of an upper room neglects to repair it, or the owner of a lower room neglects to support it, to the damage of the other occupants. Com. Dig. Action on the Case for Negligence, (A 3.)

3. *Where an action on the Case cannot be maintained.*

It seems, that no action on the Case can be maintained for any act, however tortious, which does not occasion some *temporal* damage; as for refusing to administer the sacrament, &c. See 1 Sid. 34; 1 Lev. 247.

It does not lie for a common nuisance, unless special damage be alleged. For a common nuisance, an indictment is the proper remedy. Co. Lit. 56, a; 1 Salk. 16.

It cannot be maintained against a peace officer, for arresting a person *bona fide*, on a charge of felony, without a warrant, though it should turn out that no felony had been committed. Doug. 359.

So it cannot be maintained against husband and wife, in favor of one, whom the wife has married under pretence of being sole. 1 Lev. 247.

This action cannot be maintained for a mere trespass; as if a man enters on my land, and does a nuisance there. 1 Rol. 105; L. 25.

However, in some cases, the party injured may waive the force, and recover for the consequential damages in this form of action.

It was formerly the practice in this State, to bring Case against assessors for an illegal assessment, and this had the sanction of many eminent practitioners for a long period of time. The compiler has in his hands a number of precedents in Case, against assessors for illegal assessments, drawn by Worthington, Paine, Parsons, Putnam, &c., in the cases *Peabody v. Wood et al.*, Essex, 1787; *Hibbert v. Colby*, Essex, 1785; *Webster v. Wingate*, Essex, 1786; *Story v. Prentiss et al.*, 1794, all drawn by C. J. Parsons, and in *Green v. Washburn*, by Worthington, &c. In *Agry v. Young*, 11 Mass. R. 220, it was decided, that Trespass was the proper form of action.

Generally, no action can be maintained against any judge, justice of the peace, or other judicial officer, for any official act in a judicial capacity, though illegal. See 12 Co. 24; Lut. 1561. As if a judge of record give a false judgment. 1 Rol. 92, c. 7.

Nor, it seems, can the action be maintained against one who sues in an inferior court, without any cause of action within the jurisdiction. Show. 254; 4 Mod. 13.

If one not professing to be a farrier, should kill a horse by improper medicines, this action could not be maintained against him, &c. 1 Rol. 91. It was the folly of the party to trust him.

No action can be maintained against a surgeon or counsel, if they use proper diligence, though they should not succeed.

For a false affirmation only respecting the quality or value of a thing, without a warranty, it seems no action can be maintained. 2 Cro. 4; 1 Sid. 146; 2 Cro. 197; 1 Lev. 102.

For a reasonable use of a man's right, though to the inconvenience of another, no action can be maintained; as if a butcher use his trade in a proper place, though to the annoyance of his neighbor, or if a man erects a house and interrupts the prospect of another. 9 Co. 58, b; 1 Sid. 167; 2 Cro. 159.

This action cannot be maintained, if it appears that the act was inevitable, and without any negligence, or where there is negligence in both parties. 3 East, 593. See 2 W. Bl. 896; Stra. 596.

But if a man puts up a spout, or does any act on his own soil, to the injury of another, as by causing water to flow upon his land, an action may be maintained. See Str. 634; 1 Ld. Ray. 272.

4. *In what cases Trespass is the proper form of action, and not Case, and VICE VERSA.*

It seems almost impossible to reduce all the various decisions on this subject, to any plain principles, which may serve to direct the practitioner which action to bring, in every case that may arise. The reason is, that many of those decisions cannot be reconciled with each other, without making the difference of adjudication depend on immaterial, circumstantial differences, which, in all probability, had no weight in the minds of the judges, by whom the cases were determined.

The attempt to reconcile conflicting decisions is founded on an impression, that the judges, by whom those decisions were made, entertained the same views of the law in relation to the cases, but that the circumstances of the cases themselves were so different, that the same principles would not be applicable in each. It is therefore clear, that where the judges differed in opinion respecting the law relative to the cases, an attempt to reconcile their decisions with each other is incongruous and illogical. All therefore that will be attempted here, is to point out those decisions, which taken together, form a system consistent with itself, and which is not at variance with the principles of the law in relation to other actions, or with its various other analogies.

For this purpose, will be considered how far the form of action depends upon the inquiry, —

I. *Whether the injury complained of is the immediate effect of an act, or only a consequence.*

II. *Whether the act was wilful, or negligent, or merely accidental.*

III. *Whether the act was done immediately by the person to be charged, or through the intervention of another.*

IV. *Whether the act was lawful or unlawful.*

V. *Whether the injury is done to the possession, or only to a reversionary interest.*

VI. *Where the act is done by animals, how far they were incited or negligently permitted to do it by the defendant.*

VII. *In what cases (if any) where Trespass may be maintained, the plaintiff is at liberty to waive the force and bring Case.*

I. *How far the form of action depends upon the inquiry, whether the injury complained of is the immediate effect of an act, or only a consequence.*

It seems clear, that where the injury complained of, is the immediate effect of an act of the defendant, accompanied with force, whether the injury is intentional or not, Trespass is the proper form of action. 11 Mass. R. 57, 137, 519; 1 Str. 593; 3 East's R. 600; 18 Johns. R. 257. And therefore if A drives his carriage *wilfully* against B's, A is answerable for the damages in an action of Trespass. 5 T. R. 648. So if A is sitting in a carriage belonging to B, and C drives his carriage against it, whereby A is injured, A may maintain Trespass against C. 7 Taunt. 698. So if A drives his carriage *carelessly* or *accidentally* against B's, Trespass lies. 3 East's R. 593; 2 Campb. R. 464.

And therefore, also, where the plaintiff's horse was in a stage coach, which was driving on the proper side of the road and the defendants were riding in a cart, and driving violently, had forced the shaft of their cart into the breast of the plaintiff's horse and killed him, it was held by Lord Kenyon, that Trespass *vi et armis* was the proper form of action. The action, he said, was brought against the persons who had done the injury; the injury, from whatever negligence it proceeded, was accompanied with violence; and the effects were immediately injurious. *Sheldrick v. Abery et al.* 1 Esp. R. 56.

So if the owner of a ship, being himself on board, and standing at the helm, *unintentionally* runs her against another ship, from unskilful management, the remedy is Trespass, and not Case. 1 Camp. 497.

But though the law is thus clearly laid down in the cases just cited, yet there are other cases in which the decisions seem irreconcilable with them. Thus in the case of *Ogle et al. v. Barnes*, 8 East's R. 188, it was laid down, that if A runs his vessel against B's intentionally, B may bring an action of Trespass; but, if he does it from *negligence* or *carelessness*, he should bring Case. So where the declaration was that the defendant, through *negligence*, drove his cart against the plaintiff's chaise, it was held that Case might be sustained. 5 Bos. and Pul. 117.

These last cases cannot easily be reconciled with all those first cited, unless a different rule is to be applied to injuries or casualties arising from the management of vessels, which are impelled by the wind and waves and directed by rudders, from that which is applied to carriages, which are drawn by horses or other cattle, and guided by reins or bridles, &c. But it seems clear that there can be no foundation for making such a distinction; since there would be as little reason in it, as in making the form of action depend on the color of the horse.

If A, in discharging his musket, accidentally wounds B, it is held by some that Trespass lies, because the injury is immediate. See Str. 596. Others think that Case is the proper form of action, because the injury arises from negligence. See 2 Hen. and Mun. 423. See also Com. Dig. Action on the Case, (A. 5.) In New York, (18 Johns. R. 257, *Percival v. Hickey*,) it was held that Trespass might be maintained;

but in *Blin v. Campbell*, 14 Johns. R., it had previously been settled, that, *where there is an immediate injury attributable to negligence, the party injured may declare either in Case or in Trespass, at his election.* It should not be forgotten, however, that no action can be maintained, if the defendant has been in no fault whatever. For if at the very instant a soldier is discharging his musket at a lawful time and place, a person runs across and is wounded, neither Trespass nor any other action can be maintained. Hob. 134; Bac. Abr. Trespass, D.

Where the injury is not the immediate effect of an act, but only a consequence, Case is the proper form of action, and Trespass cannot be maintained. Thus, if A throws a log out of a cellar into the highway, and strikes B, whether intentionally or not, Trespass lies; but if, while lying there, an accident happens to B, by falling over it or oversetting his carriage, Case lies. The form of action here does not depend at all on A's intention. For, in the first case, it seems Trespass lies, though A did not intend to strike B with the log, and, in the second instance, Case lies; and even although A places the log in the highway for the express purpose of doing an injury to B. *See other cases of malicious misfeasance, Com. Dig. Action on the Case for Misfeasance, (A. 6.)*

So where B had a warehouse over A's cellar, and laying a great burthen, broke the floor through and spoiled three butts of wine, it was held that Case and not Trespass was the proper form of action; 8 Mo. 274; Cro. Eliz. 285; the injury being consequential and not an immediate effect.

II. *Whether the act was wilful, or negligent, or merely accidental.*

Where the injury arises from a mere casualty, without any negligence or fault, whatever, it seems no action can be maintained, as in the case cited from Hob. 134. So it seems reasonable, that if two vessels run foul of each other in a dark night, one can maintain no action against the other; for, if otherwise, then if both were injured, each might maintain an action against the other, which would be absurd; and so for the same reason, if both parties are to blame, neither should be allowed to bring an action against the other. However, it seems negligence or want of care in one party, will be no excuse for an unlawful act on the part of the other. As if A places a log in the highway, and B's carriage is overset by it, B may maintain Case against A, although by using more care he might have avoided the log, because A had no right to place the log there.

Where the injury arises from negligence, if not the immediate effect of the act complained of, Case only can be maintained; (See 5 T. R. 648, and the other authorities before cited;) but if it is the immediate effect of such negligent act, it seems either Trespass or Case may be maintained, at the plaintiff's election. Wedderburne, *Arguendo*, 3 Burr. 1561.

Where A drives his carriage against B's, it is obvious that it may arise either from negligence or wilfulness. It is equally clear, that B may not know to which to impute it. According to the principles just laid down, B might maintain either Case or Trespass against A. If he brought Case, he must ascribe the injury to negligence, for if he alleged the act to be done wilfully or intentionally, the court would direct a

nonsuit. See 6 T. R. 128; 8 T. R. 192. And it is probable, if the plaintiff brought case, alleging the act to be done negligently, and from his own witnesses it appears to have been done violently and wilfully, that the court would adopt a similar course. But the defendant would hardly be permitted to introduce witnesses, to show that the act, which the plaintiff had imputed to carelessness and negligence, was in fact done wilfully and maliciously, for the purpose of defeating the plaintiff's action. *Ideo Quære*. In such case therefore it would undoubtedly be more safe to bring Trespass.

III. *Whether the act was done immediately by the person to be charged, or through the intervention of another.*

Where a servant, in the course of his employment, does an act amounting to a trespass, and for which Trespass would lie against the servant, an action on the case alone can be maintained against the master. See 2 Hen. Bl. 442; 6 T. R. 659; 5 D. & E. 448; 1 East's R. 106; 5 Esp. R. 18. This is the general rule; but there are some exceptions and restrictions.

1. It is settled that a sheriff is liable in an action of Trespass, *vi et armis*, for the act of his deputy, in cases where that action might be brought against the deputy. Doug. 42; 1 Mass. R. 520.

2. A distinction is established between the negligent act of the servant, and his wilful act. For the former, it is laid down, an action on the Case may be maintained, but for the latter, it is said, the master is not liable.

And therefore where A's servants *negligently* drove a vehicle over a boy in the streets and maimed him, the plaintiff recovered. 1 Ld. Raym. 739; 6 T. R. 659.

But where a servant, driving his master's carriage, his master not being present, *wilfully* drove against the plaintiff's chaise, it was held, that the master was not liable to an action of Trespass for the wrong. 1 East's R. 106; See also 1 Taunt. 568.

So when an action of Trespass was brought for driving a ship, of which the defendant was master, upon a boat of the plaintiff's and sinking her; and it appeared that the defendant was owner and master of the ship, but, though on board, did not give the orders which occasioned the injury, and which in fact were given by the pilot; and the jury gave a verdict for the plaintiff, on the ground of negligence in the defendant; the court held, that Trespass could not be maintained. 1 Bos. & Pul. 446.

It is laid down, that for the wilful act of a servant, the master is liable in an action of Trespass. 6 D. & E. 125; 5 D. & E. 648. But this seems to be overruled in the case before cited, from 1 East's R. 106.

That the master is not liable in any form of action for the wilful act of his servant. See 2 Hen. Bl. 44; Salk. 441. And the reason is said to be, that if the master were liable for the wilful, malicious act of his servant, he might be ruined.

The law requires that a master should, at his peril, employ servants who are skilful and careful. 6 T. R. 125; 2 Hen. Bl. 442; 1 Salk. 441; 5 T. R. 648; 1 Burr. 562. From these and many other cases, both before and since, which are not easily reconcilable with each oth-

er, it is not easy to draw any plain principles to decide, either in what cases the master is or is not answerable for the act of his servant, or where liable, in what cases Trespass or Case is most proper to be brought. The following conclusions however are respectfully submitted.

1. If A commands B to do an act amounting to a trespass, each is liable in Trespass.

2. If A commands or licenses B, to do a lawful act, as to cut down a tree on A's ground, and B *wilfully* cuts down a tree on C's ground, it seems A cannot be answerable for it; for A never authorized B to cut down a tree on C's ground, and *quoad hoc*, B is not A's servant.

3. But if B was hired by A to cut down his wood, and *through mistake* trespassed on C's lot, it seems A would be liable in an action on the Case, and the reason is, that A was guilty of negligence, in not giving sufficient instruction, adapted to the capacity of the person whom he has seen fit to employ, to avoid such mistakes. Further, as A trusted B, it is more proper that he should suffer by his mistake, than that C should who never trusted him. Further, if any fault is in B, A has an action against him. Lastly, however, C, at his election, may have an action of Trespass against the servant B.

4. Though it is laid down generally, that, for the wilful, malicious act of a servant, the master is not liable at all, from the nature of the case, there must often be exceptions. Thus, if A sends his horse to B to be shod, and B's apprentice *maliciously* lames him, there can be no doubt that A may either maintain an action of Assumpsit, on an implied promise, against A, for unskilfully shoeing the horse, alleging the act to be done by the master, of which the apprentice's act will be sufficient evidence; or he may bring an action on the Case for negligence against the master; or he may bring Trespass against the servant, if he can prove the malice. The master here is liable for the act of his servant. 1. Because of the trust placed in the master by his customer, which public policy requires that the master should, at his peril, see is faithfully performed. 2. Because the apprentice would not have had the opportunity of committing the wrong, except in the course of his usual employment in his master's service. 3. Though, in such cases, it may be said that the master ought not to be liable, because, if liable, it will be in his servant's power to ruin him; it may be answered, that the master can never be ruined by any act, which otherwise will not be equally ruinous to the person injured by the servant's act, and it is more proper that the master, who trusted the servant, knows his character and responsibility, and can dismiss him when he pleases, should be ruined by him, than that a stranger should, who trusted only the master, and who knows nothing of, and has never trusted the servant.

5. And for the same reasons, if A sends his horse to B's shop, to be shod, and the apprentice, in the master's absence, instead of shoeing him, maliciously knocks the horse on the head and kills him, B must be liable in Case. For the confidence by A is placed only in B, and not in the apprentice, and the horse being in B's shop, B is responsible for his safety, against any acts done by his servants. But in such case, if the horse were killed by a stranger in B's shop, B could not be held, for he never trusted the stranger any more than A, and A must have his remedy for the horse against the stranger.

6. Though the master is properly liable in Trespass only, for any acts done with force by his servant, *by his express orders*, yet if the plaintiff, supposing the act to be done through negligence in the servant, brings Case against the master, the master will hardly be permitted to introduce evidence of his own orders, to show that Trespass was the proper form of action, for then it would be in the master's power by withholding or producing evidence, which probably is only in his own knowledge, to defeat whichever action is first brought against him, which would be unreasonable.

See various cases in relation to this subject. 2 Lev. 172; 2 Stra. 1083; 1 Bos. & P. 404; 5 Bos. & P. 446; 3 Camp. R. 403; 4 M. & S. 27. &c.

IV. *Whether the act was lawful or unlawful.*

Where the act is lawful at first, and the consequences only are injurious, it seems Case is the proper form of action. And therefore where A had a right to enter on B's land, and entered and fixed a spout to his own house, so that the water was conveyed from it, into his neighbor's premises and injured the buildings, it was resolved that Trespass would not lie, but only Case. 2 Ld. Raym. 1399; Holt's R. 22; Bac. Abr. Trespass, A.

So where A digs trenches and diverts a watercourse from B's land, or sets up a spout on his own land and throws water on B's land, B may maintain Case. *See* Stra. 634; 1 Ld. Raym. 272.

There is a distinction however where the original lawfulness of the act depends upon a license *in law*, and where it depends on a license *in fact*. For abusing a license *in law* Trespass lies, because the wrongdoer then becomes a trespasser *ab initio*, and the act which at first was lawful, by the abuse of the license, becomes a constituent part of the trespass. For abusing a license *in fact*, Case only lies. The wrongdoer does not there become a trespasser *ab initio*, and is liable merely for the abuse of his license. Thus, if A borrows a horse to ride ten miles, and rides twenty, Case lies. But if he enters a tavern and there misbehaves himself, Trespass lies for the original entry; because he becomes a trespasser *ab initio*. Vin. Abr. Actions, (M. c. 6.)

It is said by some, however, if D delivers cattle to B to plough with, and B kills them, D may bring either Trespass or Case; though others are of opinion that he should bring Case, because B had the cattle lawfully in his possession. *See* 1 Inst. 57. Unless, however, it is settled, that a man cannot commit a trespass on a thing lawfully in his possession, there can be no doubt but Trespass might be maintained; though, according to the modern practice, an action of Trover and Conversion would usually be brought for such a wrong.

However, the law is expressly laid down, that if a bailee of cattle for a specific purpose, abuses them, Trespass lies, because by the breach of trust, he ceases to be any longer lawfully in possession. As if a shepherd kills sheep intrusted to his care; or if a man kills cattle delivered to him to plough his land, &c. 2 Rol. 556.

If D hires a chaise of the owner H, and H's servant drives it, H and not D is answerable for the negligence of the driver; and if, in such case, D does an injury to the horses, H may maintain an action of Trespass against him. The reason seems to be, because the horses

being under the control of the driver, the owner's possession continues. See *Deane v. Branthwaite*, 5 Esp. R. 35.

V. *Whether the injury is done to the possession, or only to a reversionary interest.*

Where an injury is done to real estate, Trespass lies for the tenant in possession, and Case for the reversioner, according to their respective interests. 1 Rol. 103, l. 35; 3 Lev. 131, 209; 1 Johns. R. 511; 3 Johns. R. 461.

And therefore, for stopping a rivulet, and drowning a close, and thereby spoiling the trees, it was held that Trespass lies for the tenant in possession, and Case for him in reversion. 3 Lev. 209.

So if the owner of a horse lets him to hire for a certain time during which he is killed by the owner of a cart driving it violently against him, the remedy for the owner of the horse against the owner of the cart, is Case, and not Trespass. 3 Camp. R. 187.

But it seems if a trespass is committed on goods in the possession of a bailee, generally, either the bailor or the bailee may maintain Trespass. 2 Rol. 569, l. 22. But as this is an ancient authority in the case of the bailor, perhaps it would be considered a special action of Trespass, i. e. an action on the case, only, could be maintained, unless the bailor, at the time of the Trespass, had an immediate right of reducing the goods into his own possession. This distinction is recognized in *Walcot v. Pomeroy et al*, 2 Pick. 121.

It is laid down in *Lotan v. Cross*, that if the owner of a chattel permit another to use it gratuitously, Trespass will lie for the owner for an injury done to it by a third person, while it is so used. 2 Campb. 464.

VI. *Where the act is done by animals, how far they were incited or negligently permitted to do it, by the defendant.*

If A sets his dog on to worry sheep or other animals, or encourages him to bite a person, Trespass lies. But if, after notice, he keeps a dog used to bite, and a person is bitten, or an animal worried by him, A is liable to an action on the Case. 2 Ld. Raym. 608; Salk. 662.

But it seems, if cattle trespass on land, though there is no pretence that the owner was guilty of any thing more than negligence, or non-feasance, Trespass lies. *Ib.* Though the law is clearly so laid down, yet there is no principle to warrant the difference of decision in the two classes of cases. For a dog accustomed to bite, and known by the master to be so, in which case alone an action on the Case lies at common law, should have the same precautions used against him by the master to prevent mischief, that the owner of cattle, which it is known are naturally disposed to rove, is bound to use to prevent trespass by them. If Case therefore is the proper form of action in the first class of cases, there seems to be no discernible principle, that can make Trespass the proper form of action in the last. But in each of these cases, the law seems to be too well settled to be now shaken.

VII. *In what cases, (if any,) where Trespass may be maintained, the plaintiff is at liberty to waive the force, and bring Case.*

The difficulty of determining which form of action to bring in particular cases, has led the court to permit an amendment by changing the form of action. But as this seems to be an inconvenient innovation,

and as it is not probable, it would be suffered in any case, where the rights of third persons would be at all affected by it, it may still be worth while to give a moment's attention to the above inquiry.

It is matter of common learning, that whenever A commits a trespass in taking and carrying away the goods of B, and converting them to his own use, B may either bring Trespass *vi et armis*; or, waiving the force, may bring Trover and recover for the conversion of them; or he may waive the tort altogether, and bring an action as on a sale and delivery of the goods, and an implied assumpsit or undertaking to pay the full value of the goods. Other analogous cases might be stated, grounded on the general maxim of the law, that though you cannot increase, you may always qualify a tort. See Cro. Eliz. 824; 3 Wils. 338. And Lord Ellenborough (3 Campb. 188,) says, "it may likewise be worthy of consideration, whether in those instances where Trespass may be maintained, the party may not waive the trespass and proceed for the tort." To adopt this idea in its full extent, would be to render the action of Trespass altogether unnecessary, and to substitute Case in its room; since then, in cases of assault and battery, the person injured would be able to bring Case. But this doctrine would be inconvenient, and could be introduced only by overturning a long series of decisions.

However, in cases where one is injured by the act of another accompanied with force, and where also there are consequential damages, for the whole of which a recovery may be had in an action of Trespass, and which consequential damages would have been sufficient to sustain an action on the Case, if there had been no force, there appears to be no impropriety in suffering the plaintiff to waive the force and the direct injury, and recover in Case for the consequential damages. This however could not be permitted, where the waiving of the force would affect the plaintiff's right to recover, by destroying the ground of action. Thus, suppose A takes off the roof of a house, containing H's furniture, and in consequence of it the rain injures the furniture. Now in this case, there may be two injuries, the taking off of the roof, which then would be a trespass; and the consequential damages, by the rain; for which, if D's taking off the roof were out of the question, an action on the case might be sustained. Now if the house were D's house, and in D's occupation, it is very plain that H could not maintain an action of Trespass against D at all, because in such case D commits no trespass in taking off the roof of his own house; and yet H might well maintain an action on the Case for the injury done to his furniture by the rain, in consequence of it. Now the idea meant to be conveyed in the above proposition is, that in cases where D has no right to take off the roof, and consequently H may maintain Trespass against him for doing it, H may waive the Trespass, if there are consequential damages, and recover for them alone in an action on the Case. But if D commits an assault and battery on H, and puts out one of his eyes, there would be no propriety in suffering H to bring an action on the Case for it; 1. because the damages are immediate and not consequential; 2. because, if the force is waived, there does not appear any consequences, upon which to ground an action of the Case, which are not necessarily waived also. *Ideo Quære.*

Further Observations.

In Hard. 60, where Trespass *vi et armis* was brought against A for

laying dung on his land, and causing stinking water from it to run to the walls of the plaintiff's house and into his cellar; after verdict for the plaintiff, and a motion in arrest of judgment, the court held, that the action would lie. But this was after great wavering in opinion, and the court at first were against the plaintiff, *because* a man cannot be a trespasser with force and arms for an action done on his own ground where the consequences only are injurious. According to modern practice, Case, would be the proper action. But, if the act had been done on the plaintiff's ground, Trespass only could be maintained. *Ld. Raym.* 188, *Arguendo* in *Shapcott v. Mugford*.

If A breaks B's hedge, and cattle get in and do damage, B shall have Trespass, and may recover for all the damages in that form of action. *Vin. Abr. Trespass*, (Q. a. 4.)

If A's land is fenced off from B's by a fence belonging to B, and standing on B's land, and C breaks down the fence, and thereby D's cattle break in and do damage to A, it seems A cannot maintain an action of Trespass against C, but must bring Case against him; for one man cannot have Trespass for breaking another's fence. *See Str.* 131; *see also* *Keb.* 577, *Pl.* 38; *Ld Raym.* 1402.

If a justice of the peace grants execution within twenty-four hours after judgment, he is liable to an action of Trespass. *10 Mass. R.* 356.

For all proceedings *coram non judice*, Trespass is the proper remedy. *2 Wils.* 382.

A search-warrant is no justification, if stolen goods are not found, and Trespass will lie. *See 1 D. & E.* 535.

DECLARATIONS IN CASE FOR MISFEASANCE, NONFEASANCE, NEGLIGENCE, MALFEASANCE, &c.

For carelessly driving a team against plaintiff's chaise.

For that, on &c., in S aforesaid, to wit, in the main-street, two of the plaintiff's daughters were riding there in the plaintiff's chaise, of the value of &c.; and the said D's team, whereof he then had the sole management, was, at the same time passing along in the same street. And the plaintiff avers, that the said D, then and there, so carelessly and negligently managed his team aforesaid, that his cattle, which were then and there drawing the said D's team aforesaid, drew the same upon and against the chaise aforesaid; so that the chaise aforesaid, with the plaintiff's daughters aforesaid in it, was, through the negligence of the said D, overturned by the team aforesaid, and so broken and shattered thereby, that the same chaise was rendered altogether unfit for use, and the plaintiff's daughters aforesaid were in great hazard of their limbs and lives, to the damage, &c.

R. DANA.

NOTE. Unless the plaintiff has a right to waive the force in this case, it may be doubted whether Case can be maintained. *See 3 East*, 593.

See also 8 T. R. 188. According to the current of authorities it would be safe to declare in Trespass; for the injury, though arising from defendant's carelessness, is direct.

For the carelessness of defendant's servant, in running his stage against plaintiff's chaise.

For that whereas the plaintiff, on &c., at &c., was possessed, and the owner of a certain chaise, of the value of &c., and of a certain horse, which was then and there harnessed to said chaise; and the plaintiff was then and there sitting and riding in said chaise, so harnessed, in a certain public highway, there called Boston-street. And whereas, there, on the same day, the said D was possessed of a certain stage-coach or carriage, and also of four horses, drawing the same through and along said street; and the said D, then and there, by a certain servant of him, the said D, had the care, government, and direction of the said stage-coach or carriage, and horses; yet the said D, not minding nor regarding his duty in this behalf, then and there by his said servant, so negligently and unskillfully managed and behaved himself in this behalf, and so ignorantly, carelessly, and negligently drove and managed, guided, and governed said stage-coach or carriage and horses, that the said stage-coach or carriage of the said D, for want of good and sufficient care and management thereof, and of the horses, then and there drawing the same, as aforesaid, then and there struck against the said chaise of the plaintiff, with such force and violence, that his said chaise, wherein he was then and there sitting and riding as aforesaid, was thereby upset, broken to pieces, and destroyed, and the plaintiff thrown with great violence from and out of his said chaise, upon and against the ground, and thereby his thigh, hip, and body, were greatly bruised, and his life endangered, &c. *Burnham v. Paine, S. J. Court, 1802. Judgment for plaintiff.*
S. PUTNAM.

Against pilot for running ship aground.

For that the said D, at &c., on &c., was one of the pilots for the port of &c. duly appointed and sworn, according to law in such case made and provided, with a branch or warrant for the due execution of the duties of said office, and entitled to the legal fees of pilotage, according to the law aforesaid; and for that the said plaintiff was then and there owner and in possession of a certain ship, called &c., bur-

thened about — tons, and laden with a valuable cargo of &c. [*merchandise*] lying in the port of —, which ship then and there drew more than nine feet of water, to wit, — feet of water, and was bound out of said port, with said cargo on board, to proceed on a voyage to &c. And the said D, then and there, in the execution of his said office, as one of the pilots aforesaid, for the said port, and for the legal fees of pilotage, took upon himself all the charge of piloting said ship, out of said port, and promised the plaintiff that he would faithfully do the same; yet the said D, not regarding the duties of his said office, nor the charge he had taken upon himself, as aforesaid, so ignorantly, negligently, and unskillfully managed said ship, in piloting her out of said port, that he run the said ship aground on certain rocks in the said port; by which means the said ship was greatly damaged in her bottom, sheathing, planks, and timber, and great part of her cargo was damaged and wasted; and the plaintiff has been put to great expense in repairing and refitting the said ship, and unlading her cargo, and relading the same on board other vessels, and hath wholly lost the use of said ship, from that time to this; all which is &c. *Thomas v. Hunt.* T. PARSONS.

Against owners; for carelessness of master in running his ship foul of plaintiff's boat, whereby she was sunk.

FIRST COUNT. For that the said plaintiffs, at &c., on &c., were the owners, and lawfully possessed of a certain fishing boat, called &c., burthened about thirteen tons, then and there lying at anchor, and employed in the fishery, with the articles, mentioned in the schedule hereto annexed, on board the said boat, being also the property of the said plaintiffs; and the said T and E were, then and there, the owners and in possession of a certain ship, called &c., then and there being and sailing, of which one A. then and there had the care and management, and was the master, duly appointed by the said T and E, and for whose negligence, carelessness, and unskillfulness, as master of the said ship, the said T and E then were, and now are answerable; and the said A, then and there so negligently, carelessly, and unskillfully managed and steered the said ship, that the said ship, for want of good and sufficient care and management thereof, fell foul of, run down, and sunk the said boat, with the said articles on board of her, by reason whereof the said plaintiffs have wholly lost the said boat, with all the articles

aforesaid, and also all the profit and benefit of the said boat in the fishing business.

For carelessness alleged in the owners.

SECOND COUNT. And for that the said plaintiffs, at &c., on &c., were the owners, and lawfully possessed of another fishing boat, called &c., burthened about thirteen tons, then and there lying at anchor, and employed in the fishery, with certain articles on board of the said boat, other than, but similar to those mentioned in the said schedule, being also the property of the said plaintiffs, and the said D and E were then and there the owners, and in possession of a certain ship, called &c., then and there being and sailing, and the said D and E then and there so negligently, carelessly, and unskillfully managed and steered the said ship, that the said ship, for want of good and sufficient care and management thereof, fell foul of, run down, and sunk the said other boat, with the said other articles on board of her; by reason whereof, the said plaintiffs have wholly lost the said boat, with all the articles aforesaid, and also all the profit and benefit of the said boat, in the fishing business.

Against owners for carelessness of master, in running down plaintiff's boat.

THIRD COUNT. And for that the said plaintiffs, at &c., on &c., were the owners and lawfully possessed of another certain fishing boat, called &c., burdened about thirteen tons, then and there lying at anchor, and employed in the fishery, with articles other than, but similar to those mentioned in the said schedule, on board the said boat, being also the property of the said plaintiffs; and the said D and E were then and there the owners, and possessed of a certain ship, called &c., then and there being and sailing, of which one A, then and there had the care and management, and was the master, duly appointed by the said D and E, and for whose carelessness, negligence, and unskillfulness, as master of the said ship, the said D and E then were, and now are answerable; and the said D and E by the said A, master of the said ship, as aforesaid, then and there so negligently, carelessly, and unskillfully managed and steered the said ship, that the said ship, for want of good and sufficient care and management thereof, fell foul of, run down, and sunk the said boat, with the articles on board of her; by reason whereof, the said plaintiffs have wholly lost the said

boat, with the articles aforesaid, and also all the profit and benefit of the said boat in the fishing business; all which is to the damage, &c. *Pierce v. Stearns, &c. Essex, S. J. C. 1797.*
T. PARSONS.

Against owners, for carelessness of skipper, in running foul of plaintiff's schooner; with special damage.

For that the plaintiff, at &c., on &c. owned and was possessed of, a certain fishing schooner, called &c., whereof one J F was skipper and master, which was there lying at anchor for the purpose of fishing there, and the said E, then and there owned and possessed, a certain fishing schooner, called &c., whereof one E S was skipper and master, then sailing on the high seas; and the said E S, his servant in that behalf, then and there had the management of said schooner, owned by the said E; yet the said E, by his said servant, so negligently navigated his said schooner, that she, by the negligence of the said D's said servant and skipper, with great force struck against the said schooner, &c., then at anchor, as aforesaid, and so damaged her, that the bowsprit, one cable, one anchor, and one anchor stock, of and belonging to her, were then and there wholly lost; and the said schooner &c., and her rigging were then and there so damaged by said striking, that they became wholly unfit for pursuing her then fare of fishing, and the same was totally lost thereby.
N. DANE.

NOTE. Judgment for plaintiff. S. J. C. Essex, 1802. *Thorndike v. Lee.*

Against the master of a sloop for running foul of plaintiff's sloop at anchor, &c.; with special damage.

For that the plaintiff, on &c., at &c., was the master and owner of a sloop, called the S, burthened about — tons, and worth \$—, which said sloop was then and there riding at anchor, well secured and fastened, being there fully loaded and bound for sea. And the said E was then and there master, and on board of another sloop under sail, and ought carefully to have conducted, guided, and managed the same; but he, the said E, careless of his duty as master of the said other sloop, so carelessly and negligently navigated, guided, and steered her, that the last mentioned sloop struck the sloop of which the plaintiff was master and owner, and in divers places rent and tore away the mainsail, parted the cable and broke away the anchor of the sloop

of the plaintiff aforesaid; whereby the plaintiff was in great danger of losing his sloop aforesaid, and the cargo of the same; and much other damage the said E then and there did to the plaintiff; to the damage, &c.

J. QUINCY, JUN.

For carelessly kindling a fire on defendant's land which set fire to plaintiff's wood lot.

For that the said D, on &c., was possessed of a certain close, adjoining to another close, belonging to the plaintiff, both lying in &c., and each having large quantities of brush and other combustibles on them, as the said D well knew; yet the said D, intending to injure the plaintiff, then carried and set fire to the brush in his, the said D's, close aforesaid, which burnt with great violence and soon consumed the said D's brush, and being carelessly managed by the said D, spread, and for want of care in the said D, caught the brush, young trees, and wood in the plaintiff's close, and burnt fifty trees thereof, and large quantities (being twenty loads) of wood, all of the value of \$—, to the damage, &c.

NOTE. In an action on the case, for carelessly setting fire on one's own land, whereby the plaintiff's wood lot was consumed, it was held by the court, that the want of ordinary care is a sufficient ground to maintain this action. *Barnard v. Poor*, 21 Pick. 378.

That whether gross negligence or the want of ordinary care is proved, the damages must be the same, i. e. the actual loss sustained, and no more. *Ib.*

That in Case or Trespass, or other action, for damages, the jury, in assessing damages, ought not to take into consideration, counsel fees, or other expenses of prosecuting the suit, beyond the taxed costs. *Ib.*

For carelessly kindling a fire on the defendant's land whereby plaintiff's barn was consumed.

For that the plaintiff, on &c., was, and still is seized and possessed of about fifty acres of land, in said M, on which there was a barn with sixty tons of hay in it; and a fruitful orchard was also on said land; of all which the said D was well knowing; yet the said D, on &c, at M aforesaid, wittingly kindled a fire on his, the said D's, land next adjoining to the plaintiff's, and at the distance of sixteen rods from the plaintiff's said land, and so negligently watched and tended the said fire, that the said fire came into the plaintiff's said land, consumed said barn, and the hay therein of the value of \$—, and six fat sheep, of the value of \$—, there in said barn being, and also forty-five rods of log and rail-

fence, of the value of \$—, and killed forty fruit-bearing apple-trees in said orchard, and consumed and destroyed the plaintiff's grass growing on said land; to the damage &c. *Harding v. Cutler.* THACHER.

For kindling a fire in a pasture whereby plaintiff's wood lot was consumed.

For that whereas, according to the law and custom of the land hitherto used and approved, every person is bound to keep his fire safe and secure, by day and by night, so that no damage may accrue to his neighbors, for want of good care of his fire. And whereas, on &c., the plaintiff was, and ever since has been, seized in his demesne, as of fee, of a certain tract or lot of woodland, being, in &c., containing about — acres; and the said T was then, and ever since has been, seized and possessed of another tract of land, in &c. aforesaid, near to the plaintiff's lot of woodland aforesaid; the said T, afterwards, viz. on &c. at &c., did rashly and inconsiderately kindle a fire in a certain pasture, parcel of his, the said T's tract of land aforesaid, and then and there so negligently, carelessly and inconsiderately kept his said fire, that for want of good care thereof, — acres of the plaintiff's lot of woodland aforesaid, were, by that same fire, burnt over and greatly damaged, and all the trees then standing and growing upon the said — acres of woodland aforesaid, of the plaintiff, being — in number, and of the value of \$—, were burnt, killed and utterly destroyed; to the damage &c. JONA. SEWALL.

Immoderately driving a horse.

For that the said E, at &c. on &c., hired of the plaintiff a certain horse of the plaintiff, to ride from A to B, in the same county and back again, for a certain sum of money between them agreed upon, and the plaintiff then and there delivered to the said E the said horse, to ride as aforesaid; and the said E, the said horse then and there so immoderately rode, that by reason thereof, and for want of due care of the said horse, the said horse thereafterwards, on &c., died, which is to the damage, &c. T. PARSONS.

NOTE. The case of *Wheelock v. Wheelwright*, 3 Mass. R. 104, seems to recognize the doctrine on which this precedent is grounded. But as it was not proved, that the defendant had immoderately driven the horse, but had merely driven the horse beyond the agreed distance, the plaintiff could not recover on his account in Case. C. J. Parsons, re-

marked, that the defendant, "by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in Trover."

Overloading and immoderately driving a horse.

For that the plaintiff, on &c., at &c., had delivered to the said E a certain gelding of the plaintiff, to ride from A, in the county of B, to C, in the county of E; but the said T, on the same day, at said A, so grievously overloaded, and so immoderately, and with such unreasonable swiftness rode the said gelding, that the said gelding thereafterwards, on the same day, by means of such immoderate overloading and unreasonable riding, died; to the damage, &c. 2 *Ins. Cler.* 189.

For untying plaintiff's boat, by reason of which it was carried by the current against a bridge and much injured.

For that whereas, on &c., at &c., the plaintiff was possessed of a certain fishing-boat, called &c., of the value of \$—, lying in the harbor of said S, against the side of a certain wharf, there called the Key, and tied with a certain rope, called a fast, unto a certain post on said wharf, as of his proper fishing-boat; and being so possessed thereof, said E, contriving and maliciously intending to spoil and deprive said plaintiff of all benefit and advantage of his said boat, did then and there maliciously untie said rope wherewith said boat was tied as aforesaid; whereby the said boat did float with the stream; and the water in said harbor then running with great force towards the stone bridge at S aforesaid, the said boat was thereby driven by the stream against said bridge, with so great force, that the same boat was thereby much broken and damaged; to the damage &c. *Bohun*, 243.

For obliterating an indenture whereby plaintiff lost his debt.

For that one A B, on &c., at &c., made a certain bill indented, sealed with the seal of the said A B, for a debt of \$—, by which said bill, the said A B, was held to the plaintiff in said sum, to be paid to the plaintiff at a certain day now past, which said bill the plaintiff did on &c., at &c., deliver to said D, to be prosecuted against said A B, upon an action of debt for said \$—, upon said bill. And the said D, in consideration of \$—, to him beforehand paid, did then undertake and promise to prosecute said suit for the plaintiff, for the debt aforesaid, in form aforesaid, yet the said D, after-

wards, on &c., at &c., deceitfully and fraudulently, the said bill in divers parts and places thereof, erased and obliterated divers words, so that the said bill is of no force; and the plaintiff, for that cause, could not recover his debt aforesaid; to the damage, &c. *Bohun*, 273.

For shooting plaintiff's dog.

For that whereas, on &c. at &c., the plaintiff was possessed of a certain spaniel dog, of the value of \$—, as of the proper goods of him, the plaintiff, whereby he received benefit and profit; yet the said D, not ignorant of the premises, but maliciously intending and contriving to injure the plaintiff in this particular, then and there discharged a certain gun, charged with gunpowder and shot, at and upon said spaniel dog of the plaintiff, whereby said dog was so wounded, that he then and there died; whereby the plaintiff lost the benefit and profit, which he actually received of said dog, and was thereby much injured; to the damage, &c. *Bohun*. 204,

NOTE. It would be safe here to declare in trespass. See *Count in Trespass*, *post*.

For enticing away plaintiff's apprentice.

For that one A B, on &c., and long before, was, and still is, the plaintiff's apprentice and servant, and duly bound to the plaintiff, to dwell with and serve him, for and during the term of — years, from and after the — day of &c.; of all which the said T was well knowing; yet the said T, contriving to defraud and deprive the plaintiff of all the profit and benefit of the service of said apprentice, did on &c., at &c., entice and procure the said A B, then being the plaintiff's apprentice and servant as aforesaid, of which the said T was knowing, without the plaintiff's leave, and against his will, to depart and leave the plaintiff's service; by means of which enticement, the said A B, afterwards, to wit, on the same day, departed and left the plaintiff's service, without leave and against the plaintiff's will. And the said T, afterwards, on the same day, there knowing the said A B then to be the plaintiff's servant and apprentice, received and admitted him, the said A B, into his, the said T's, service, and has ever since retained and kept him therein; whereby the plaintiff has lost the benefit and profit of the service of his said apprentice and servant, from &c., aforesaid, unto this day.

R. DANA.

Another.

For that whereas, one A B, a minor, on &c., and long before, was and still is the plaintiff's apprentice and servant duly bound to the plaintiff, to dwell with and serve him, for and during the term of — years from &c.; of all which the said T was well knowing, yet the said T contriving to defraud and to deprive the plaintiff, of all the profit and benefit of the service of the said apprentice, did on &c., at &c., entice and procure the said A B, then being the plaintiff's apprentice and servant as aforesaid, and whereof the said T was well knowing, as aforesaid, to depart and leave the plaintiff's service, against his will and without his consent, and by means of which enticement, the said A B afterwards, *viz.* on the same day, there departed and left the plaintiff's service, without his consent and against his will; and the said T, afterwards, *viz.* on the same day, there well knowing the said A B to be the plaintiff's apprentice and servant, admitted and received the said A B into his, the said T's, service, and has ever since retained and employed him, the said A B, therein, and harbored and secreted the said A B, from his said lawful master, and has deprived the plaintiff of all the benefit and profit of the service of his said apprentice and servant, from &c., to the day of purchasing this writ; to the damage, &c. *Quiner v. Hatch*, 1796.

S. SEWALL.

Against charterers for sending a ship chartered, on a voyage different from that agreed on, whereby she was lost.

For that whereas the plaintiffs, being owners of a certain ship, called the Vansittart, by a certain charter party of affreightment, dated August 13, 1788, let the same to the East India Company [the defendants,] to freight, for a certain voyage, with her to be made, in trade and also in warfare, as the said company, or any of their governors, &c. should require and direct; and therein and thereby the plaintiffs covenanted with the said company, that the said ship should be used by the said company, in trade or warfare, if required by the said company; that the master should observe the orders of the said company; and that the said company should have power to displace him or any other officer or officers belonging to the said ship; and the plaintiff avers, that, afterwards, to wit, on &c., the said ship sailed on her voyage aforesaid, and in the service of the said company, and that the said company, afterwards and while the

said ship was in the service of the said company as aforesaid, without the knowledge or consent, and against the will of the plaintiffs, employed the said ship in and upon a certain voyage and service, not being a voyage and service of trade or warfare, and not being a voyage or service, mentioned in, or intended to be warranted by, the charter party aforesaid, or upon which the said ship ought to have been employed, to wit, in and upon a certain voyage and service of observation and discovery, in and to a certain dangerous sea, straight or passage, situate to the eastward of a certain island, called the Island of Banca, for the purpose of exploring the said sea, straight, or passage; and wrongfully and injuriously, without the knowledge or consent, and against the will of the plaintiffs, kept and detained the said ship, in the said voyage of observation and discovery, for a great length of time, to wit, the space of &c.; by reason whereof the said ship in the course of the said voyage of observation and discovery, was stranded, sunk and lost, to wit, at &c. *Lewin, &c. v. East India Company.* See *Peake N. P. Cases*, 241.

NOTE. According to the doctrine of Parsons, C. J. in *Wheelock v. Wright*, 3 Mass. R. 104, Trover was the proper form of action.

Against a painter for not taking a good likeness, &c. This count seems equally in case and assumpsit.

For that the said E, being a face painter, and pretending great skill in painting, the said plaintiff, on &c., at &c., employed the said E to paint, well and artificially, a portrait of the said plaintiff, of a good likeness, and well resembling the said plaintiff, for the sum of \$—, which was then and there paid to the said E, by the said plaintiff for that purpose, and the said E, then and there undertook to draw the said portrait, well, carefully and skilfully, of a good likeness, and resembling the said plaintiff; and although the said E, afterwards, viz. on &c., at &c., did paint for the said plaintiff, a portrait of the said plaintiff, and then and there deliver the same to the plaintiff, yet the said E did not well, carefully, and skilfully, paint the said portrait, of a good likeness and resembling the said plaintiff, but, on the contrary, in painting the said picture, then and there so ignorantly and unskilfully behaved himself, that the said portrait was not drawn in the least like or resembling the said plaintiff, and the painting thereof was so ignorantly and unskilfully done, that the said portrait was and is, of no use or value whatsoever, &c.

By residuary legatees v. executors for not suing a bond given to testator, &c.

For that whereas one C, on &c., at &c., by his bond of that date, bound himself in the sum of \$—, to be paid to said A B on demand; and afterwards, the said A B made his last will and testament, and, among other things, devised the residue of his estate, after some particular legacies, to the plaintiffs, his children, in such proportion as by his last will dated &c. duly proved, approved, and in court to be produced, shall appear; and in his last will, appointed the said D, and one E and one F, his executors; and the said E and F refused said trust, but the said D accepted of it; and the bond aforesaid came to the hands of the said D, on the death of the said testator, to wit, on &c. And the said D, though he was bound by his office and duty of executor, to sue for and recover the said debt then immediately; yet he hath refused and neglected to sue for the same; but held the same bond in his hands until the — day of &c., and then delivered the same to the plaintiffs, and though often requested, hath not sued for said debt, nor empowered the plaintiffs to sue for the same, but still unjustly refuses so to do; whereby the plaintiffs have entirely lost the debt aforesaid, and the same is become desperate and of no value, by the default and wilful negligence of the said D, no part thereof being paid to this day; to the damage &c. GRIDLEY.

Against master of ship for not delivering goods.

For that, on &c., at &c., the said D, being master of the schooner C, received on board the said D's said vessel, — quintals of good, merchantable fish, in good order, and well conditioned, to be by him, the said D, in his said vessel, transported to some port in Spain or Portugal, for the freight of \$— per quintal, and there delivered in like good order and well conditioned as aforesaid, to the plaintiff or his assigns. Now the plaintiff in fact saith, that the said D, accordingly proceeded in his said vessel, with said fish on board, to Cadiz in Spain, and there arrived with said vessel, safe from the perils of the seas; yet the said D did not deliver said fish there, nor in any other port of Spain or Portugal, to the plaintiff or his assigns, but negligently secured and kept the same, and suffered the same to become wet and rotten; whereby great part thereof was utterly lost, and all damaged, &c.

In relation to the general power and duty of a master of a ship. See Law Summary, p. 271.

By owners against master, for not taking proper care of goods, &c.

FIRST COUNT. For that whereas the plaintiff, on &c., at &c., was owner and proprietor of a certain boat or vessel, called a keel; and being so, then and there, at the special request of the said T, retained and employed him in the service of the plaintiff, to be master and commander of said vessel, and to receive and to take on board thereof, from one M, at a place called — in the county of &c., — quarters of malt of the plaintiff, of the value of \$—, and to carry and convey the same by water, from thence to B, in &c., and at said B, to deliver the same to one A, for certain wages, hire, or reward, to be therefor paid by the plaintiff, to the said T, as master of the said vessel. And although the said T, afterwards, on &c., at said E, had and received from the said M, the whole — quarters of malt aforesaid of the plaintiff, and afterwards, on the same day, set sail and departed with the said vessel from the said T, towards and for the said B, and afterwards, on &c., arrived at said B, with the said vessel, and on the same day last mentioned at said B, delivered to the said A, a part *viz.* — quarters of said malt; yet the said T, not regarding the duty of his employment, so badly, carelessly, negligently, and improvidently behaved himself, in said employment, and took so little and bad care of — quarters of the malt, residue of the — quarters of malt, so received by him as aforesaid, that the said T did not deliver the same — quarters of malt, or any part thereof to the said A, at said B, or elsewhere, although often requested; but, on the contrary, by and through his own mere neglect and default, and through his carelessness and improvidence, suffered the same, and every part thereof, while the same were, and continued in his possession as aforesaid, for such carriage, to be embezzled and wholly lost, *viz.* at &c.

SECOND COUNT. And whereas the plaintiff, on &c., and from thence to &c., was owner and proprietor of another vessel; and the said E was, during all that time, master of the said vessel, retained and employed as such by the plaintiff, and, in his service, to navigate the same from place to place, and to take care of the last mentioned vessel, and of all goods delivered to him, as such master, or put on board the same for carriage from place to place, for wages, hire or reward, to be therefor payable and paid by the plaintiff to him, as such master of the vessel aforesaid, *viz.* at &c.

And whereas, within the time aforesaid, and while the plaintiff was owner of the last mentioned vessel, and while the said E was master thereof, in the service of the plaintiff, viz. on &c., the said E, as master of the same vessel, received from the said M, by order of the plaintiff, at &c. aforesaid, other — quarters of malt, of the value of \$—, to be carried and conveyed by the said E, in the last mentioned vessel, to &c. aforesaid, by water, and to be there delivered to the said A for the plaintiff. And although, &c. [*as in the preceding counts, verbatim, to the conclusion.*]

NOTE. There was another count of trover for sixteen quarters of malt; and it was moved in arrest of judgment, and objected, that the two first counts were in the nature of an action on the custom of the realm, which is founded in *contract*, and cannot therefore be joined with trover, which is a tort; and that this action ought to have been laid upon a promise and undertaking; and not being so laid was ill. But the court overruled both objections, and declared the counts all well joined. *Dickson v. Clifton*, 2 Wils. 319.

How far the owners of a vessel are liable for the acts and on the contracts of the master, see Law Summary, p. 267, (2d edition,) and the cases and authorities there collected.

Against owners for embezzlement by master and crew.

For that the plaintiff, at &c., on &c., shipped on board the schooner of said E, called &c., then bound on a voyage in the said E's service, to &c., a quantity of silver and gold, to wit, &c., all of the value of \$—, with the said A, the said E's servant, and commander of his said vessel for said voyage, and for whose conduct in said service, the said E is answerable; to be transported in said vessel, on the plaintiff's account and risk, to &c., there to be delivered to the plaintiff, his order or assigns, he or they paying freight therefor, at the rate of \$—, per cent., with primage and average accustomed; and the said A, in his said capacity, then and there signed a bill of lading, according to the custom of merchants, thereby engaging for the delivery of said gold and silver, in manner aforesaid, in consideration aforesaid; whereby the said E, according to the custom of merchants, then and there became obliged, that the said gold and silver should be safely kept, the dangers of the sea only excepted, and transported, and delivered as aforesaid, and then and there promised the plaintiff accordingly. And the plaintiff in fact says, that the said A, master of the said E's vessel, in said E's service, as aforesaid, arrived safe at &c., aforesaid, with said gold and silver, and that the said gold and silver

was not safely kept, but by the said E's master aforesaid, and by the crew of said E's vessel, for whom, in such respects, he is answerable, was there, on board said vessel, on &c., converted to their own use and embezzled, and was never delivered to the said plaintiff, nor to his order, nor to his assigns, though often requested thereto, and though the plaintiff was ever ready to pay the freight, primage and average aforesaid; by means whereof the said E, according to the usage and custom of merchants, became obliged to pay the plaintiff his damages, thereby occasioned, which the plaintiff avers, amount to \$—, on demand; yet though requested, &c.

PRATT.

Against an innholder for suffering plaintiff's horse to stray away, &c.

For that whereas, according to the law and custom of the land, the innkeepers that keep common inns to lodge travelers therein, who abide in the same, are bound to keep their goods and chattels, being within those inns, day and night without diminution, pilfering, or loss, so that no damage or loss may happen to any such travelers, or such guests, for want of due care in such innkeepers or their servants; and the said plaintiff, on &c., at &c., being lodged in the inn of the said E, had a certain gelding, of the value of \$—, within that inn, and delivered the same to the said E, then and there to be safely kept; nevertheless, the said E, knowing the said gelding to be within his inn, the same day and place, did so negligently keep said gelding, that the said gelding, for want of safe keeping thereof, by the said E, and his servants, went forth and wandered from the said inn; whereby the said plaintiff not only lost the use and profit of the said gelding in going on his said journey, in doing necessary and important business, but the same thereby remained undone; and the said plaintiff expended and laid out divers sums of money, not only by reason of the want of his said horse, but also the said plaintiff always, from the said day &c., lost the use and benefit of his said gelding. And the said E, hath not delivered to the said plaintiff, his said gelding, although the said E, on &c., at &c., was thereto requested, but hitherto hath refused, and still doth refuse so to do, or make him any satisfaction for the same, &c. *Mod. Ent.* 144.

With regard to the liabilities of innholders, see extract on that subject in the Law Summary, p. 373.

Against carrier for not delivering goods, &c.

For that the said T, on &c., and long before, was, and ever since hath been, and now is a common carrier of goods and chattels, and during all that time, hath been used to carry for gain and hire, the goods and chattels of all persons whatever, requesting thereto, from A to B, and thence back again to A. And whereas, by the laws and custom of the land, every common carrier, who receives any goods and chattels of any person, for gain, hire and profit, to carry the same, is bound to carry the same without diminishing or losing any part thereof, so that no damage whatever may happen thereto, by default of such common carrier, or his servant; and whereas the said plaintiff, on &c., at &c., was possessed of &c., as of his proper goods and chattels; and the said plaintiff, being so possessed thereof, on the same day, at &c., delivered to said T, said goods, to carry the same safely and securely, from A aforesaid, to B aforesaid, and there to be delivered to the said plaintiff; and the said T then and there had and received the said goods, to be carried and delivered in manner above set forth; yet the said T hath not, at any time since the said — day of — delivered said goods to him, the said plaintiff, as he ought to have done; but instead thereof, the said goods, afterwards, on &c., at &c., were wholly lost, for want of due care and preservation of the same by him, the said T; to the damage, &c. *Mod. Ent.* 145.

NOTE 1. Judgment was arrested in this case, after a verdict; because trover was joined in the same declaration; whereas a contract and tort could not be joined together. 1 Salk. 10. And see 1 Sid. 244; but *quare* of this determination, for contract. 2 Wils. 319.

NOTE 2. 4 T. R. 264. If one be entrusted with my goods, and put them into a third person's hands contrary to orders, I may declare against him in trover and conversion; but otherwise, if he *misdeliver* them merely by mistake.

If the *consignor* of goods deliver them to a particular carrier, by order of *consignee*, and they be afterwards lost, the *consignor* cannot maintain an action against the carrier for the loss, although he paid for the booking of the goods; for the delivery of the goods to such a carrier, is a delivery to the *consignee*, who alone may bring the action. And the court declared, that the question, in whom the legal right was vested, governed all cases of this kind; and that the former cases, 5 Bur. 2680, 1 T. R. 650; went upon the *special agreement* between the carrier and the consignor. *Davis v. Peck*, 8 T. R. 330. (MSS.)

For the liability of common carriers. See Law Summary, p. 357.

2. *Disturbance, Nuisance, &c.*

This action lies for a disturbance in the use of any right, privilege, or interest, which a man has a right to enjoy ; thus it may be maintained for any act, which prevents a man from using a right of common, a right of way, a seat in a church, &c. in as advantageous a manner, as he otherwise might, and as he is entitled to do. It lies for inclosing a parcel of common land ; or for surcharging it ; or for digging or ploughing up the soil, &c. So it may be maintained for stopping a way, or ploughing it up ; or damaging it with teams, &c. Lut. 111. 1 Vent. 275.

So this action may be maintained for taking toll of one, who is entitled to pass toll free. 1 Salk. 12.

So it lies for interrupting or diverting a watercourse ; stopping a drain, stopping ancient lights, &c. 2 Wils. 174 ; 7 Mass. R. 313 ; 13 Mass. R. 507.

So it lies against the officers, presiding at elections, for unjustly refusing the vote of a qualified voter, and even although they exercise their judgment honestly.

It lies also for a nuisance ; such as erecting works injurious to the health ; or which spoil the grass or corn ; or hurt the cattle of a neighbor. 1 Bur. 260.

It lies also for not repairing fences ; or not keeping ditches in order ; so that their contents overflow in consequence. Cro. Eliz. 191.

This action for a nuisance is local. *Warren v. Webb*, 1 Taunt. 379.

DECLARATIONS IN CASE FOR DISTURBANCE, NUISANCE, &c.

For darkening ancient lights, by erecting a building near them.

For that whereas the plaintiff, on &c., and continually from thence hitherto, was possessed, and yet is possessed, of and in an ancient messuage, situate &c., for a term of divers years, then and yet to come and unexpired, and of twenty-one windows, in and upon part of the south side, and of eight windows in and upon part of the east side of the said messuage, in and through which said windows, light into said messuage, on the said — day of &c., was let, and was accustomed to be let, and then and yet ought to be let, for the enlightening of his said house ; yet the said T and E [defendants,] not ignorant of the premises, but maliciously contriving and intending to deprive the plaintiff of the use and benefit of the said windows, afterwards, viz. on the said — day &c., at &c. aforesaid, a certain edifice so near the said windows of the said house of the plaintiff, built and erected, and from thence until the day of the purchase of this writ, continued ; and thereby the said windows were stopped up and darkened ; whereby the plaintiff was,

during all that time, deprived of, and lost the use and benefit of the said windows; &c. See *Lilly Ent.* 81.

NOTE. In this action, Salk. 460, 714, a motion was made, in arrest of judgment, that the message was not alleged to be an *ancient one*; but being after verdict, the court disallowed it, and seemed inclined to think the declaration would have been good on demurrer; and it was so ruled. 1 Vent. 237, 239. (MSS.)

If a man builds a new house and sells it, and afterwards sells the land adjoining, to another, if such purchaser erects a building so as to darken the lights of the first house, this action may be maintained against him. Ray. 87; 1 Lev. 122.

Under the Revised Statutes of Massachusetts, ch. 60, sec. 27, no right or privilege of way, air or light, can be acquired by any use or enjoyment under twenty years.

By sec. 28, the acquiring of such easement may be prevented by giving written notice in the manner therein directed, and recording the same in the registry of deeds, for the county where the land lies, within three months after serving the notice. By the same section, the service of such notice, shall be deemed such an interruption to the use, &c. as shall prevent acquiring a right thereto by any length of time whatever afterwards.

The provision of sec. 27, seems to be a virtual enactment of the opinion of Wilmot, Justice, "that upon evidence of an adverse enjoyment of lights for 20 years or upwards, unexplained, a jury might be directed to presume a right by grant or otherwise," &c. See *Dane's Abr.* ch. 74, art. 10, sec. 3, where this learned Judge's opinion is treated without any *superfluous ceremony*.

For erecting a privy near plaintiff's dwellinghouse, &c., so that the tenant insisted on an abatement of the rent, and finally left the house.

For that whereas the plaintiff, on &c., was, and from thence hitherto hath been, seized in his demesne as of fee, of a certain dwellinghouse, with the appurtenances, situate in &c., then in the occupation of one E F, as tenant thereof, in the right of the plaintiff, the said D, well knowing the premises, and maliciously intending to injure the plaintiff in his estate of inheritance in the said dwellinghouse &c., on &c., at &c., wrongfully and unjustly, erected and built a certain privy near to the wall of the said dwellinghouse, and continued the said privy, for a long time, viz. from thence hitherto, and during all that time, permitted the same to be full of ordure, excrement, and filth, whereby the said ordure, &c., on &c., and on divers other days and times, between that day and the day of the purchase of this writ, there soaked and penetrated through the wall of the said dwellinghouse, and thereby greatly mouldered, rotted and spoiled the said wall; and by reason thereof, and by the nasty, noisome, foul, and stinking stench, vapors, and smells, arising from the said privy, and from the same, penetrating and as-

cending into the said dwellinghouse, the same was and hath been greatly annoyed, and rendered noisome ; and the said E F, on that account, and for no other cause, within the time aforesaid, to wit, from &c. to &c., would not continue to hold the said dwellinghouse, as tenant thereof, without a great abatement of the rent thereof, and on &c., surrendered up the said dwellinghouse to the plaintiff, and would not continue tenant thereof any longer; and the said dwellinghouse, by means thereof, continued without any tenant for a long time, to wit, for the space of two years then next following; &c.

NOTE. In the above case, if the tenant had not obtained an abatement of the rent, he might have maintained this action for the nuisance during his tenancy, and the landlord would have had no right of action to recover damages during that time ; but on account of the abatement of the rent, and the eventual loss of the tenant, this action might be maintained by the landlord for the nuisance during the tenancy ; but the tenant could maintain no such action after the abatement of the rent. *See* 3 Wils. 461 ; 3 Pick. 348. But where the injury is to the reversion, as well as the possession, the action may well be maintained by the landlord, for the injury to his estate, as well as by the tenant for the injury done to his possession. *See* 1 M. & S. 239, 334 ; 3 Lev. 209.

If a nuisance is erected during the life of a testator, the devisee may have an action, if it is continued afterwards. 2 Cro. 231.

For digging a bank whereby plaintiff's house and wall adjoining fell down.

For that whereas the said P P, on &c., was seized of and in a dwellinghouse, with the appurtenances, in &c., whereof a house, called a garden-house, otherwise, the house on the wall and a garden, then were parcel, in his demesne as of fee; and being so thereof seized, the said A A, B B, C C, and D D, well knowing the premises, but maliciously contriving and intending to hinder and deprive the said P P of the profit and advantage of the said house, called the garden-house, &c., and unjustly to aggrieve the said P P, on the said — day of &c., did dig stones in a certain piece of ground, called &c., in — aforesaid, so that the said house and three hundred perches of a stone wall, inclosing the said garden, afterwards, to wit, on &c., entirely tumbled and fell down upon the ground, in the said piece of land, so dug, &c. 2 Saund. 397.

NOTE. This declaration was adjudged good on a writ of error brought to reverse the judgment. *Smith et al. v. Martin*, 2 Saund. 394. (MSS.)

It is said, if a man dig a pit in his land, so near that my land falls into the pit, this action may be maintained. But if a man build a house, and make cellars upon his soil, whereby a house newly built in an ad-

joining soil falls down, no action can be maintained. See 1 Sid. 167; 2 Rol. 565, l. 10. See the case of *Thurston*, in 12 Mass. R. 220.

For erecting a dam above plaintiff's dam, &c.

For that the plaintiff, ever since the — day of &c., has been seized in his demesne, as of fee, and has been in actual possession of an ancient grist-mill, or water-mill to grind corn, situate on a rivulet or stream in &c., called &c., together with an ancient dam, to raise a head of water so high as should be necessary for said mill, and of having the whole water of said stream, without obstruction or impediment, flow into said pond, for the benefit of said mill, as ancient rights and privileges appurtenant to said mill; yet the said D hath since, to wit, on &c., unjustly erected a new dam across the said stream, above the plaintiff's dam aforesaid, within the limits of the plaintiff's pond and ground, that he had a right to flow, and thereby cut off part of his said pond, ponded the water above, and stopped the natural course of the water with which it anciently used to run into the plaintiff's pond; and still continues his new erected dam and obstruction aforesaid, thereby frequently stopping the water from coming to the plaintiff's said mill, and obliging the same to stand still for want of water, and at other times, letting out the water through said new dam, so suddenly, and in such large quantities, as to waste and tear away a great part of the plaintiff's said dam; whereby the plaintiff's mill aforesaid, of the yearly value of &c., is rendered useless; all which is to the damage, &c. T. PARSONS.

NOTE. In declarations for turning a water course, it is good to state it as an *ancient watercourse*, which has been accustomed to run to the plaintiff's mill, without setting forth any prescription; for these words are tantamount. Cro. Car. 499.

In declarations for disturbing water courses, if the defendant is the owner of the soil through which the water passes, it will be necessary for the plaintiff to show not only a possession, but also a title to the easement. But, against a mere wrongdoer, it will be sufficient for the plaintiff to allege a possession. See *Vernon v. Goodrich*, 1 Str. 5.

For erecting a mill and diverting a watercourse.

For that whereas the plaintiffs, on &c., and ever since have been, and still are, seized in their demesne, as of fee, of two corn mills in &c., with their appurtenances, and the plaintiffs and those whose estate they have in said mills, have time out of mind, had the free course of the water at Ipswich river, to and from the said mills, for the use thereof, and the sole privilege of serving the inhabitants of Ipswich

aforesaid, in grinding their corn for the customary and lawful toll, while they may be duly served by the said mills, till the plaintiffs were disturbed and hindered therein, by the said D; and the plaintiffs ought accordingly to hold said mills with the privileges aforesaid, freely and undisturbed; yet the said D, in no wise ignorant of the premises, but maliciously contriving to disturb the plaintiffs in the enjoyment of their said mills, with the privileges and appurtenances thereof aforesaid, and deprive them of the profits thereof, on or about &c., erected a certain corn-mill in Ipswich aforesaid, on Ipswich river aforesaid, at the Falls a little below the plaintiffs' mills aforesaid, with a dam to the same, and have continued, and improved the same ever since, and still do so; whereby they are continually drawing a great deal of the plaintiffs' water, and grind much of the corn of the said inhabitants of Ipswich, while they might be duly served by the plaintiffs' mills aforesaid, and cause a backwater that hinders a free course of the stream of Ipswich river aforesaid, from the plaintiffs' said mills, to the great nuisance of the plaintiffs' mills aforesaid, the destruction of the privileges thereof aforesaid, and to the damage &c.

NOTE. By ch. 116, of the Revised Statutes of Massachusetts, no action at common law, can be maintained for the erecting, maintaining, or using any mill or mill-dam, except as allowed in that chapter, &c. § 30.

The mode of proceeding on a complaint for overflowing land by the erection of a mill-dam, is there pointed out in detail.

For erecting a dam and obstructing a water course belonging to an ancient mill.

For that the plaintiffs (husband and wife,) were, on &c., and unto this day, are seized in right of said E, in their demesne as of fee, of a certain close of about four acres of land, and of a certain water-mill thereon standing, with the appurtenances, all situate in said S. And the plaintiffs, and all whose estate, they, in right of said E, have in said close and mill, from time whereof the memory of man runneth not to the contrary, have had, until obstructed by said D, the free course and use of a stream of water, running &c.; and the plaintiffs still ought to have and hold the same, free and undisturbed; whereof the said D was well knowing, and contriving to deprive the plaintiffs of their profits of their said mill and close, there, on &c., did erect a dam across said stream, in the aforesaid close of said D, and threw a great number of stones into said stream, on the easterly side

of said mill, and the same continued until the — day of &c., and thereby raised the stream twelve inches above its usual and due height, and caused a back water, hindering the free course of said stream from the said mill, to the great nuisance thereof; and thereby obstructed and prevented the plaintiffs in the use of their said mill, and deprived them of the profits thereof, for divers days and times between said &c., all which are &c.

W. PUNCHON.

For diverting a watercourse from an ancient mill.

For that the plaintiffs, on &c. last past, were, and ever since have been, and now are, seized of a certain water-mill, called a corn or grist-mill, with the appurtenances, situate in M aforesaid, commonly called and known by the name of Swan's mill, in their own demesne, as of fee; and that the plaintiffs, and all those whose estate they now have in the said mill, with the appurtenances, had, and from the time whereof the memory of man runneth not to the contrary, were used to have, and now ought to have, a certain watercourse, called and known by the name of Spicket river, running to their said mill; and being so seized, the said D, not being ignorant of the premises, but intending to injure the plaintiffs and deprive them of the use and profit of their said mill, did at M aforesaid, on &c. aforesaid, and on divers times and days between that time and the — day of &c., dig up and remove the banks of said watercourse, and divert a great part of the water thereof, so running as aforesaid from their said mill, so that the said mill, which before was able and was used to grind fifty bushels of corn in every twenty-four hours, now, and during the time aforesaid, by reason of the diversion aforesaid of the said water, is, and was able to grind only four bushels of corn in every four-and-twenty hours; by reason of which, the plaintiffs, for all that time, have lost and have been deprived of the profits of their said mill, and still continue deprived thereof; to the damage &c.

T. PARSONS.

For overflowing plaintiff's meadow.

For that the plaintiff, on &c., and long before, and ever since, was and is seized of his demesne, as of fee, and actually possessed of a certain parcel of meadow land, containing by estimation — acres with the appurtenances, situate in &c. bounded &c.; and whereas the water from

the said brook,* from the time whereof the memory of man runneth not to the contrary, in its natural channel, was wont to run; yet the said D, not ignorant of the premises, but maliciously intending to deprive the plaintiff of the use and profit of his said — acres of meadow land, on &c., and continually afterwards, by the space of one year then next following, the ancient course of the water of said brook at &c. aforesaid, with a certain sluice in the easterly side of said brook, on &c. erected by him, the said D, did obstruct; by reason of which obstruction, the water of said brook, overwhelming the banks thereof towards the said — acres of meadow land, wholly overflowed the same, and thereby spoiled, carried away, and destroyed — hundred weight of the plaintiff's hay, on the said meadow land, then and there lying, and being of the value of £—; whereby the plaintiff lost said hay, and was deprived of the profit of said — acres of land, for a length of time, to wit, from &c. to &c.; all which &c. 1 *Wils. Rep.* 174.

For overflowing plaintiff's meadow by erecting a dam.

For that the plaintiff, ever since the — day of &c., has been lawfully seized and possessed of a tract of meadowland, in &c., containing &c., bounded &c.; of all which, the said D was well knowing; but the said D, minding and contriving to injure the plaintiff, and deprive him of the benefit of his meadow land, hath ever since the said — day of &c., maintained and kept up, and continued a mill-dam in &c. aforesaid, across a brook, there commonly called Stony brook; and by means thereof, caused the water of the brook aforesaid, to overflow and drown the plaintiff's meadow land aforesaid, ever since the said — day of &c.; whereby the plaintiff's grass, growing in his meadow aforesaid, within the time aforesaid, and of the value of £—, has been made worse, damaged and destroyed; and his meadow land aforesaid, is become spongy, rotten and impassable; and the plaintiff has also, during the time aforesaid, thereby been prevented clearing his said meadows.

TROWBRIDGE.

The same and special damage.

For that whereas the plaintiff, on &c., at &c., was and ever since hath been, seized in fee of three acres of meadowland, situate &c., lying on each side of the brook, common-

* Mentioned in the boundaries.

ly called Steepbrook, and bounded &c., and the said D, by means of a mill-dam, by him on &c. erected on his own land and across said brook, in &c. aforesaid, and by him ever since the said — day of &c., continued there across the brook aforesaid, hath obstructed and stopped the natural course of the water of the brook aforesaid, and thereby caused it to overflow and drown the plaintiff's meadow aforesaid, ever since the said — day of &c.; whereby the plaintiff's grass growing on the same meadow, in that time, of the value of &c., hath been greatly damnified, his meadow aforesaid made spongy, rotten and good for nothing, and forty lengths of the plaintiff's four-rail fence, of the value of \$—, on the said meadow at the time aforesaid standing, has been taken up and carried away.

For injury to a common pasture, by cutting and spoiling the grass, &c.; surcharging.

For that the plaintiff, on &c., and before was, and ever since hath been, and still is, lawfully possessed of, and in a certain messuage, and two hundred acres of land, with the appurtenances, lying and being in &c.; and by reason thereof, the said plaintiff, during all that time aforesaid, of right had, and still of right ought to have, common of pasture in and upon a certain waste or common, called &c., in &c. aforesaid, for all his commonable sheep, levant and couchant, upon his said messuage and land, with the appurtenances, every year and at all times of the year, as belonging and appertaining to his said messuage &c.; yet the said D, well knowing the premises, but intending to injure the plaintiff in this behalf, and to deprive him of the benefit and advantage of his said common of pasture, belonging to the said tenements, with the appurtenances as aforesaid, while the plaintiff was possessed of his said tenements and appurtenances as aforesaid, and had such right of common of pasture as aforesaid, on &c., and on divers other days and times, between that day and the day of suing forth of the original writ of the plaintiff, at &c., wrongfully and injuriously eat up, depastured, and spoiled the grass then growing, and being in said waste or common, with divers sheep and lambs, to wit, two hundred sheep and two hundred lambs; whereby the plaintiff could not for a long time, to wit, during all the time last aforesaid, have, use, or enjoy his said common of pasture, in and upon the said waste or common, in so ample or beneficial a manner, as he ought to have had and

enjoyed the same; but during all that time, was deprived of great part of the profit and benefit thereof; to the damage of the said plaintiff, &c.

For injury to common pasture, by digging soil &c., and fencing off part &c.

For that the plaintiff, on &c., at &c., was seized in his demesne, as of fee, of a house and about four acres of land, situate in said &c., and of perpetual commonage appertaining thereto, for all his cattle (levant and couchant on said land,) in and upon all parts of a tract of waste or common land, in &c. aforesaid, containing about fifty acres of land, called &c.; and being in actual possession of the same, the said D, on &c., entered on said tract, called &c., dug up the soil, and erected posts thereon, and built a fence four hundred and fifty rods in length thereon, and thereby damaged the soil, on which said posts and fence were placed, and fenced off — acres of said tract, wherein the plaintiff had his commonage and right of pasture aforesaid; whereby the plaintiff is unjustly deprived of his right of commonage on the part of said tract of land so fenced off, is straitened in the enjoyment of his right aforesaid, and deprived of all benefit of commonage for his cattle within the part so fenced off.

B. PRATT.

For injury to right of common by driving off plaintiff's cattle.

For that the plaintiff, on &c., was seized, and ever since has been, and yet is, seized of and in two certain closes of pasture, in &c., containing &c. in his demesne as of fee; and whereas one A B, during the time aforesaid, was, and yet is seized of and in a certain close of pasture, containing &c., lying between and adjoining to the plaintiff's said two closes; which three closes lie together, not separated nor divided by any fences, hedges, or ditches; and whereas the grass, growing on the plaintiff's two closes aforesaid, on &c., and ever since, was worth &c.; and the plaintiff and all those whose estate he hath, ever been wont, and have had good right to pasture their cattle in the closes aforesaid; yet the said D, not ignorant of the premises, but maliciously and fraudulently intending to deprive him of the grass aforesaid, and of all benefit thereof, did on &c., and on divers days and times between that day and — day of &c., drive the plaintiff's cattle, to wit, from the closes aforesaid, where the plaintiff had put them to pasture, into the highway in &c., and did, during all the time aforesaid, wholly

prevent the plaintiff's said cattle from feeding in said closes; whereby the plaintiff, during the whole of that time, hath wholly lost the benefit of his grass aforesaid, and his cattle have been greatly impoverished; and he has lost much time, and has been put to great trouble in seeking after his said cattle, and driving them often to his closes aforesaid, and otherwise greatly damaged &c.

For obstructing a private way by digging a ditch, &c.

For that the plaintiff, at &c., on &c., and continually afterwards, unto &c., was seized in his demesne, as of fee, in a close of pasture, called &c., in &c.; and that the said A, on &c., and continually afterwards, until &c., had and still ought to have for himself and servants, at all times in the year, at their will, as well a footway as a horseway through and beyond &c., called &c., from &c., to &c., and so back again, to drive and to drive back the cattle of the plaintiff, and to carry and to carry back with carts and carriages, as to said close belongs and appertains. Now the said D, contriving and intending unjustly to disturb the plaintiff, and to hinder and deprive him of his way aforesaid, on &c., at &c., a certain ditch and hedge across the said way of him, the plaintiff, in the close aforesaid, called &c., dug, made, and continued; and also the said way did so much obstruct and stop, that the plaintiff was totally hindered and deprived of his way aforesaid, in form aforesaid, to be had from &c. to the — day of &c.; to the damage &c.

NOTE. The declaration for disturbing a private way ought to show the two ends or *termini* of the way, and whether it be a footway, horseway or cartway; and if it leads to a close, should allege the plaintiff's title to the close. Uncertainty in the description of the way will be bad after verdict. See *Com. Dig. Action on the Case, for disturbance*, (B. 1.)

A person injured has also a summary remedy by entering on the wrongdoer's land and abating the nuisance. *Wales v. Stetson*, 2 Mass. R. 143; 10 Mass. R. 70. But this must be done in a peaceable manner, doing no unnecessary damage; and it seems no more than the nuisance must be abated. It seems too, that though a building, &c. which is erecting, will be a nuisance when erected, yet it cannot be abated until it has actually become a nuisance. "But, in this case, it would be advisable to give notice to the person building not to proceed, and that if he do, and the lights be obstructed, the building will be pulled down; otherwise if the building be suffered to proceed till completed, without objection, it is questionable, whether the party can justify the pulling of it down. So, if a man erect part of his building on my land, I knowing of it and not objecting, the law will not permit me afterwards to pull it down, I having tacitly consented." *Opinion of Ld. Mansfield, at Nisi Prius*, see *Com. Dig. Action upon the Case, for a nuisance*, (D. 4.)

In *Gray v. Bartlett*, 20 Pick. 193, the preceding doctrine seems to be qualified thus: where one person stands by and sees another lay out money on real estate, to which the former has title, and does not give notice, he cannot afterwards, in equity and good conscience, set up his claim. But, this doctrine will not protect one, who invades the known and acknowledged rights of another. The reason seems to be, that, in the former case, the trespass is committed unconsciously and without any knowledge of the other's right, the innocent trespasser shall not therefore be liable to damages, to one, who by not giving him warning, seems tacitly to waive his right. But, this want of notice shall not protect one, who with knowledge of another's right or claim, though without any express warning, assumes the responsibility of trespassing on his right or privilege, because he acts at his peril, and notice is superfluous to acquaint him with the other's rights or pretensions.

To maintain an action for a *public* nuisance, the plaintiff must sustain some peculiar or special damage. See *Dane's Abr. ch. 74, art. 9*; *Burden v. Crocker*, 10 Pick. 388.

For obstructing a private way by locking up a gate.

For that whereas on &c., and long before, and ever since, the plaintiff was, and yet is possessed of four acres of meadow, situate in &c., bounded &c., and then had and still ought to have, a drift and cartway through the said D's homestead, and two other closes, thereunto adjoining, from the highway before the said D's dwellinghouse, to the four acres of meadow aforesaid, for himself, cattle, horses, and carts, to pass and repass therein as they had occasion; yet the said D contriving unjustly to vex the plaintiff, and exclude him from the use of his way aforesaid, on &c., locked up the gate across the way aforesaid, and has ever since kept the same locked to this day; and so stopped up the said way to the four acres of meadow aforesaid, that the plaintiff could not, during all that time make any use of it; to the damage &c. READ.

For erecting a building across a private way.

For that whereas on &c., and long before, he, the said A, [plaintiff,] had, and continually afterwards hitherto hath been and now is, seized in part of a house and land, situate &c. in his demesne, as of fee, and the said A, and all those whose estate he now hath, during all that time, and in said part of said house and land with the appurtenances thereof, time out of mind have had, and were used and accustomed to have, a certain way, as well a foot as a horse and cartway, of twenty feet wide for his carts and carriages, from the street called &c., in &c., to and by his, said A's, part of said house and land, and so back again by and from said part of said house and land, to said street, called &c., every year,

and at all times in the year, through the way described in manner as above, to and from his said part of said house and land; nevertheless the said D, well knowing the premises, but contriving and intending to hinder, and as much as in him lay, to deprive the said A of the use of his said way, a certain building nearly twenty feet square, upon and across the said way of the said A, on &c., erected, and hath ever since continued the same, and thereby the said way did and doth obstruct and stop, so that the said A hath been totally hindered and deprived of his way aforesaid, from &c. to &c.

For obstructing a private way by erecting a fence, &c.

For that the plaintiff on &c., and long before had, and continually afterwards hitherto hath been, and now is seized, of a certain piece of marsh land, situate &c. in his demesne as of fee, and the plaintiff all that time had, and now hath, and ought to have, a certain way for passing and repassing with his teams, carts, &c., and otherwise from the common highway, in &c. aforesaid, through and over the land, which is now the said D's, lying between the plaintiff's said marsh and the highway aforesaid; of all which the said D was well knowing; but contriving to hinder and deprive the plaintiff of the use and benefit of his way aforesaid, he, the said D, on &c., at said &c., did stop the plaintiff's team, going from the highway aforesaid, through the said way as an appurtenant of said marsh land, and the said D, on &c., set up rail fences in sundry places across said way leading to the plaintiff's marsh aforesaid, in such manner that the plaintiff could never since pass, or use his way aforesaid, from said highway to his marsh aforesaid, with his teams or carriages, or otherwise; by means of all which, the plaintiff hath thereby lost the use and improvement of his marsh aforesaid. *Belcher v. Capen.* SWIFT.

For obstructing plaintiff's drain.

And for that whereas the said plaintiffs, at said S, on the said — day of &c., and long before, were and ever since have been, and still are, lawfully possessed of and in the messuage aforesaid, and by reason of their possession thereof, for all the time aforesaid, of right had, and still of right ought to have, a certain drain or sewer, to drain off filth and water, *leading from the cellar of his said messuage, through and across a certain highway, to wit, a highway there called*

Essex Street, into, across, through and over said land, late of W W aforesaid; yet the said E, contriving to injure and deprive the plaintiffs of their drain, or sewer, last mentioned, thereafterwards, on the same day, obstructed, choaked, and wholly stopped up the same drain or sewer, in part thereof in the said land, late of said W W; and still keeps and continues the same stopped up and obstructed; whereby the plaintiffs have wholly lost the benefit and use of said drain or sewer, and have been grievously damnified.

2d COUNT. And for that whereas the said plaintiffs, at said S on the said — day of &c., and long before, were, and ever since have been, and still are, lawfully possessed of, and in the messuage aforesaid, and by reason thereof, for all the time aforesaid, of right had, and still of right ought to have, a certain other drain or sewer, to drain off water and filth *leading* from the cellar of said messuage, through a certain highway, there, to wit, a highway called *Essex Street*, over and across the said land, late of said W W, unto a certain other drain, situate and being in the said last mentioned land; yet the said E thereafterwards on the same day, contriving to injure the plaintiffs, and deprive them of their said last mentioned drain or sewer, dug into, choaked, and wholly stopped up the same drain or sewer, in a certain part thereof, in the said land, late of said W W., and still keeps the same obstructed and stopped up, whereby the plaintiffs have wholly lost the use and benefit of said drain, and have been otherwise grievously damnified.

3d COUNT. And for that whereas the said plaintiffs, then and there, and long before, were, and ever since have been, and now are, lawfully possessed of, in the messuage aforesaid; and, by reason thereof, of right had and still of right ought to have, a certain other drain or sewer, to drain off filth and water, *leading* from the cellar of said messuage, over, across, and along the said land, late of said W W, to a part of the harbor of said S, to wit, to the South river there so called; yet the said E, contriving to injure the plaintiffs, and to deprive them of the said last mentioned drain or sewer, thereafterwards on the same day, wholly choaked up, obstructed, and stopped the same drain or sewer, in a certain part thereof in the said land, late of said W W, and still keeps the same obstructed, choaked, and stopped up; whereby the plaintiffs have wholly lost the use and benefit of the same drain or sewer, and have been otherwise great-

ly damnified. *Curran et al. v. West, S. J. C. Essex, Nov. T. 1804.*

For stopping a drain.

For that the plaintiff is, and for several years last past, has been seized in his demesne, as of fee, and possessed of an ancient messuage, in &c. aforesaid, and that there is, and from time immemorial has been, a certain drain and passage-way, for draining off the water from the cellar of the house of the aforesaid messuage, and pertaining thereto, which before, and until the house where said D now dwells, in said &c., was built on part of said drain, and the cellar thereof dug down to said drain, run from the cellar belonging to the said messuage of the plaintiff through the street or highway; thence into and through the ground whereon the said house of the said D now stands; thence through the land of the said D, until it vented and discharged itself into a ditch below, for the space of about fifty feet; and after the building of the said house of the said D, viz. on &c., upon part of the said drain as aforesaid, it continued so to run as aforesaid, until &c., and still ought so to run, to draw off the plaintiff's water as aforesaid, from his cellar aforesaid, as a free and open watercourse and drain for that purpose, and to the plaintiff of right belonging, as tenant and owner of said messuage; of all which the said D was well knowing; yet the said D, on the said — day of &c., maliciously contriving to injure the plaintiff, and to deprive him of his right aforesaid, and the benefit of his said drain, dug into the same, choaked and utterly stopped said drain and watercourse of the plaintiff, and so continued to keep the same stopped and choaked, from that time to this, and thereby flowed and filled with water the plaintiff's cellar aforesaid, during the time aforesaid; and by means thereof rendered the plaintiff's cellar aforesaid useless, and rotted and destroyed his provisions therein, and by the underwashing of the water, there raised as aforesaid, undermined and washed out the earth and foundations of the plaintiff's chimneys in said messuage, and ruined and destroyed them; all which is to the damage, &c. *Clark v. West.*

For building a house so near plaintiff's land, that the droppings from the roof overflowed it.

FIRST COUNT. For that one A B, late of, &c. deceased, on the — day of, &c. at, &c., erected and built a

dwellinghouse so near the land of the plaintiff, that the roof and eaves of said house overhang the plaintiff's land, which house has since descended and come to the said D and E [defendants,] as children and heirs of said A B, the father, viz. on &c., at said M, and the said D and E have ever since constantly possessed and occupied said house; and the rains and droppings, falling therefrom, wash and overflow the plaintiff's land aforesaid, and greatly injure the same; whereby he has wholly lost the profits and use of his said land for a long time; &c.

SECOND COUNT. And for that the said D and E have, from the — day of &c., until the day of the purchase of this writ, in said M, possessed and occupied and continued, a certain other dwellinghouse, built so near other land of the plaintiff, that the roof and eaves thereof overhang this last mentioned land, and the rains and droppings, falling therefrom, wash and overflow the plaintiff's land last mentioned, and greatly injure the same, whereby he has wholly lost the profits and use of his said land, during all that time; all which is to the damage &c. S. SEWALL.

See 5 Co. 101; 2 Leo. 93. This action may be maintained against him who first erects the nuisance, and against every subsequent occupier who continues it. Dyer, 320, a; Salk. 460; 2 Cro. 373.

For stopping a footway appurtenant to a messuage.

For that whereas the said P, on &c., and continually afterwards, to &c., then next ensuing, was possessed of, and dwelling in a certain ancient messuage, situated and lying in &c., and for that time had, and of right ought to have, a certain footway, leading from &c. aforesaid, in, through, and over a certain close, called C, with &c. aforesaid, to the town of A, for himself, and his servants, to pass and repass at all times at his pleasure, as to the messuage appertaining and belonging; yet the said D and E, contriving and intending unjustly to disturb him, the said P, and to impede and deprive him of the said way, on the said — day of &c., at &c., aforesaid, a certain ditch and trench, across the said way, dug and made, and the same way there with certain hedges and fences, thrown across the way, aforesaid, obstructed and shut up, whereby the said P, of the way aforesaid, in manner aforesaid held, from the said —

day of &c., to said — day of &c., wholly was impeded and deprived &c. 2 Vent. 185.

NOTE. On demurrer, &c., it was objected, that the declaration, alleging no seizin, but only possession in the plaintiff, was insufficient; but the court were of opinion, that possession was sufficient to maintain the action. 2 Vent. 186. (MSS.)

Against occupant for not repairing a way.

For that the plaintiff, on &c., and long before, was, and from thence hitherto hath been, and still is possessed of a certain messuage, situated in &c., and by reason of his possession thereof, was, and still is, entitled to a certain way, from the said messuage unto, into, through, and over a certain close of the said T, called &c., in &c., unto and into the common highway, leading to &c., and so back again from the said common highway, unto, into, through and over the said close, called, &c., unto the said messuage, to go, pass and repass, as well on foot, as with cattle, carts, horses, and oxen; and whereas the said T now is, and during all the time aforesaid, hath been, lawfully possessed of and in the said close, called &c., and of and in divers, to wit, two other closes of land, in &c. aforesaid, with the appurtenances contiguous, and next adjoining the said close, called &c., to wit, &c.; and, *by reason of his possession of the said close*, called &c., and the said two other closes of land, with the appurtenances contiguous and next adjoining thereto, during all the time aforesaid, of right ought to have maintained and repaired, and still of right ought to maintain and repair, at his own proper costs and charges, when and so often as the same hath been, and is necessary, the said way leading &c.; yet the said T hath wrongfully and injuriously permitted the said way, during all the time aforesaid, to be ruinous and out of repair, and still wrongfully permits the same way to be ruinous and out of repair; whereby the plaintiff hath been, during the whole time aforesaid, and still is totally debarred the use of said way &c. 3 T. R. 766.*

For erecting a bridge near a ferry.

Summon the proprietors of Haverhill Bridge, to answer

* This declaration was objected to on demurrer, because it did not show by what right or obligation, the defendant was bound to repair the road; as he is not bound, merely as occupier. But the court were of opinion, that it was sufficient to charge the defendant, by reason of his possession; for the plaintiff cannot know what the title of the defendant is. But it would have been different in a plea, where the defendant prescribes in right of his own estate; for he knows his own estate and must set it forth. *Rider v. Smith*, 3 Term Rep. 766. (MSS.)

to C, in a plea of trespass on the case ; for that the said C, on &c., and long before, was, and ever since has been, and now is, seized in his own demesne, as of fee and right, in a certain ferry over Merrimack river, in said county, known by the name of C's ferry, for the transportation in boats of persons, carriages, and beasts, from B to H, and from H aforesaid to B aforesaid, with a right to receive toll for the said transportation ; yet the said proprietors, not ignorant of the premises, but intending to injure the said C, in the enjoyment of his said franchise, and deprive him of the toll and profits arising therefrom, on &c., erected a bridge over the said river, near to, and within forty rods of the said C's ferry aforesaid, extending from the banks of the said river, in B aforesaid, and over said river, to the banks thereof in H aforesaid, for the passage of any persons, their carriages and beasts, from B aforesaid to said H, and from H aforesaid to said B, for a toll to be paid to the said proprietors for such passage ; and such bridge have kept from that time to the present time, and during the same time, have permitted sundry persons with their carriages and beasts, to pass the same bridge, and have received divers sums of money as toll therefor, to the great prejudice and detriment of the said ferry of the said C ; and the said C hath thereby wholly lost, during the time aforesaid, all toll and profits, arising from his said ferry ; to his damage \$1000 &c. *Chadwick v. Prop. of Haverhill Bridge.* T. PARSONS.

For carrying passengers for toll near a ferry.

Summon D &c. to answer unto the inhabitants of Amesbury, in a plea of trespass on the case ; for that the said inhabitants, at said Amesbury, for a long time past have been and now are, seized in their demesne, as of fee, of a certain passage and right to carry and convey the citizens of this commonwealth, and their horses, and all their necessities whatsoever, over a certain water, called Amesbury ferry, in their own ferry-boat, taking of every person for his passage, and for every horse and other necessities, such sum from each, as from time to time is established and assessed as the rate of ferriage over said water, by [our Justices of our court of General Sessions of the peace within and for our said county ;) nevertheless, the said D, endeavoring the said inhabitants many ways to vex and deprive of said passage, very many persons over the water aforesaid, particularly at

said Amesbury, on &c., one P and his horse, one S and his horse and one Q and his horse, did convey and carry over, receiving of each so carried, for their passage aforesaid, two pence; by occasion whereof the said inhabitants are many ways damnified and vexed.

J. LOWELL.

3. *Slander.*

An action on the case also lies, to recover damages for words maliciously spoken or written, from whence an injury accrues to a man's character or property.

Slander therefore is divided into Slander of a man's reputation and Slander of his title to his real estate.

Slander is either, 1, by words spoken, or 2, by writing, or pictures, or representations tending to hold the party injured, up to contempt and ridicule. This second species of defamation, is most commonly termed Libel.

1. *Slander of the person, by opprobrious words, &c.*

For some kinds of slanderous or malicious words, no action can be maintained, unless some special damage, naturally arising from them, is stated in the declaration, and proved at the trial; but when such special damage is so stated and proved, an action may be maintained for any false and malicious words whatever.

Some words are held to be actionable, without any allegation or proof of a special damage; not that some words are actionable, though they do no injury, but because they contain charges against a person's character, which the law will intend, cannot be made without injury.

Words actionable without allegation of special damage.

1. Words that charge a man with a crime, and which, if true, might subject him to a prosecution for it, are actionable of themselves; as to call a man a murderer, thief, traitor; to say he is perjured; has committed forgery; keeps a bawdy house; is a burglar, &c. So to charge a man with having committed a crime in another state, or one, the prosecution of which is barred by the statute of limitations, is actionable. 14 Johns. R. 234.

2. To say of a man, that he has any disorder that tends to exclude him from society; as, to say of a man, that he has the pox, leprosy, (*quære*, itch,) &c., but the words must charge the person with having it at the time, and not with having had it, which would not be actionable without special damage. 2 Cro. 430; 1 Sid. 50.

3. Words that tend directly to injure or disgrace a man in his office, or in the calling, profession, or occupation, by which he earns his living; as to call a trader, bankrupt, cheat; to say of a judge, that he is corrupt; to call a physician a quack, &c. 1 Vent. 21, 117; Godb. 441; 1 Lev. 297; 1 Sid. 327; 3 Wils. 59; Str. 762; and it is sufficient, whether the charge is general, or a particular instance, constituting an offence, is stated. Thus, to say A murdered B, is actionable, as well

as to say that A is a murderer, &c. And it is of no consequence in what language, or in what manner the words are uttered, whether interrogatively; by way of supposition or conjecture; as an epithet; by report; or as an exclamation to the person himself, or of him to a third person; so as they give the hearers to understand, that the party slandered, is guilty of the crime, or other matter, &c. alleged. Sal. 697; 12 Co. 134; 2 Cro. 407; 1 Vent. 60; Cro. Car. 318; 1 Lev. 90, 277.

See the strong case of *Pond v. Hartwell*, 17 Pick. R. 269, where the general doctrine is held, that under the general count in slander, the defendant having charged the plaintiff with the crime of theft, "any words, though in their natural and ordinary sense, *doubtful*, or *uncertain*, or *even innocent*, but which in the ordinary mode of declaring, by the aid of averments, *colloquia*, and *inuendoes*, could be shown, under the particular circumstances, to be equivocal or ironical, and to be intended by the speaker, and understood by the hearer, under whatever artful guise it may be concealed, to impute to the person the charge of crime, must be deemed slanderous, and competent, with the aid of extraneous facts, which go to show that they were used in such sense, to support such general count. Quære, if this be not going too far, and putting an innocent party in jeopardy, of suffering from the ignorance, mistake, or misapprehension of witnesses. If words not actionable *per se*, of which the court ought to be the judges, are to be construed according to the apprehension, to be entertained of them by witnesses, then those witnesses in fact become the judges.

To charge a settled minister with being a drunkard, is held actionable without stating any special damage. 13 Mass. R. 248.

To charge one with adultery is clearly actionable. See 1 Pick. 1.

To call a woman a prostitute, in New York, is said not to be actionable without special damage, as it is not in England, except in London, where it is actionable, because there is a custom to cart such women. But in Massachusetts the law is otherwise. For there, no doubt an action might be maintained, without special damage, not merely because the offence is punishable by statute, but because, if the reason why words are actionable without alleging special damage, is, because the law will intend that such words cannot be spoken against a man's character without injury, then certainly, the law must be far in the rear of common sense, if it can suppose that words charging a woman with unchastity, can be spoken of her without great injury to her character. It may suit a barbarous age, or a country where vice and debauchery are so common, that the imputation of them brings no disgrace even upon women, to determine that such words are not actionable; but to be governed by such precedents in a more advanced stage of civilization, or in a country where the imputation of such criminality brings irretrievable ruin upon the female character, must be the highest absurdity.

What is a sufficient excuse or justification.

As malice is the gist of the action, any matter, which will show that the words were not spoken maliciously will be an excuse. 5 Esp. C. 109; 3 Esp. C. 32; 4 Esp. C. 191. As, if the words were spoken as counsel in a cause, or in the course of legal proceedings; or in an application to a proper tribunal; or if read from a book; and though slanderous, if there was no intention to slander. 1 D. & E. 111; 2

Esp. C. 239 ; *1 Saund. 120*. An action of slander cannot be maintained for words spoken jocosely, and understood so by the hearers ; for in fact there can be neither malice nor injury from words so spoken. Neither will an action lie for words, spoken or written by way of counsel, or from concern, to the party himself, or to others privately and in confidence, there being no malice. But if the words were spoken maliciously, though under a pretence of either, doubtless the action might be maintained. *2 N. R. 335* ; *4 Bur. 2425* ; *2 Brownl. 151* ; *1 T. R. 110*. If the words, though actionable alone, have other words connected with them, so as to restrain the signification to an act not criminal, &c. ; or to show that no crime, &c. has been committed, no action can be maintained. *Peake, 4* ; *1 Starkie, 67*.

If the words are so uncertain, that no particular individual is designated, no action can be maintained ; as, if A, says to three witnesses in a cause, "one of you is perjured," no averment can make it certain who was intended ; and therefore no action can be maintained, unless some other words were used giving the hearers to understand which of them was intended. *See 1 Rol. 81, l. 40*.

See further for the general principles on which this action may be maintained, 3 Wils. 177 ; 2 Pick. 320.

What words are not actionable without special damage.

Words merely of reproach, or heat, containing no distinct charge of a crime, &c. are not actionable without special damage. *See 1 Johns. Cas. 129*. So also words charging a person with ill dispositions or propensities without charging any act done. *4 Esp. C. 218*. So, a mere expression of one's opinion, or suspicion ; or if the words are explained away at the time by other words. *1 Camp. 48* ; *1 Johns. Cas. 279*. It has been laid down, that to call one a bastard, who holds land by descent, or is an heir apparent to an estate, is a sufficient cause of action, as tending to his disherison. It has been said too that for such words an action may be maintained without any allegation of special damage, and even if the plaintiff holds no land. But it has also been held, that no action for such words, can be maintained without an averment of special damage. There is, however, one good reason why such words should be held actionable, apart from their opprobrious nature. Suppose A circulates the report that B is illegitimate, and some twenty or thirty years afterwards, when perhaps B's legitimacy cannot be proved, an estate falls to him which he can claim by descent only ; an adverse claimant may make use of evidence of the slanderous report, to show that B was generally reputed to be illegitimate, which, if the jury believed it, would defeat B's title. For this reason, if there were no other, a person so slandered, ought to have this action without any allegation of special damage, and whether he is an heir apparent, or holds any lands by descent, or not ; for otherwise, if he waits for a special damage, it will be then too late to recover, both from the difficulty of proof, and on account of the statute of limitations.

Words, which of themselves would seem not to be actionable, without special damage, may become so, by being connected with a man's calling, or by referring to some particular transaction. It is the office of the colloquium, to connect the words uttered, with the circumstances or matters, in allusion to which they were used, in such a manner,

as that they may appear to the court, to have the meaning, in which they were understood by the hearers, when uttered. *See Bloss v. Tobey*, 2 Pick. 320; Cowp. R. 672.

What is such a special damage as will support an action for Slander.

The loss of marriage with a particular person. This is a special damage sufficient to maintain this action, either for a man or for a woman. But the particular person must be named in the declaration. 2 Cro. 499, 323. The loss of the custom of particular individuals; these too must be named in the declaration. Salk. 693; 2 Saun. 307.

Exclusion from society; alleged specially with the names of the individuals who refuse to associate as usual.

The loss of a place, whether in possession or expectation, if attributable to the slander only. 1 Lev. 248; 8 D. & E. 130.

The loss of employment, with the names of the persons who employed or would have employed, if the slanderous words had not been spoken. 2 Esp. R. 237; 3 Bos. & Pul. 587.

Any other damage naturally resulting from the slander, and attributable to that alone, but alleged particularly, that is, with the names of individuals and a time and place. Doug. 375; 2 Esp. R. 234.

As, the loss of credit, i. e. that a particular person in consequence of the slander would not trust him, &c.

Whether the loss of the fellowship of neighbors, without naming individuals, is a sufficient allegation of special damage, does not seem clear. Where a man's reputation suffers from slander, one of the greatest evils that results from it is the exclusion from respectable society, that immediately follows. In what manner this injury can best be made to appear to the court, is doubtful. It may be obvious to almost every one, that the plaintiff is shunned and despised on account of a belief in the defamatory words, and yet if he is driven to name the individuals, who avoid his society on that account, he may not be able to find any who will be willing to give such a reason for it. On the other hand, if, on a general allegation of an exclusion from society, witnesses were allowed to testify that, since the slander, the plaintiff had been neglected and shunned, still it would be impossible for them to testify to the motives, by which each particular individual was governed.

It seems that a general loss of reputation, by reason of the slander, cannot be given in evidence. 10 Johns. R. 281.

Of the manner of declaring in Slander, generally.

The following short directions may be useful to an inexperienced pleader. The declaration should begin with an introduction or recital, that the plaintiff is a person of good character, innocent and wholly unsuspected of the particular crime, &c. charged in the slanderous words. It should then state, that the defendant, intending to defame the plaintiff, and bring him into hatred and contempt, at a certain time and place specified, in the presence and hearing of divers good people of this commonwealth, in a certain discourse which he then and there had of, and concerning the plaintiff, uttered and proclaimed the false, scandalous and malicious words, following, of and concerning the plain-

tiff, *viz.* stating the words, as understood and remembered by the witnesses, with as much exactness as possible, and with such inuendos as will express at large, what was plainly understood and contained in the slanderous words. If there is any special damage, it should be stated thus, "by reason of the speaking of which said several false, scandalous and malicious words, the plaintiff has been brought into great infamy and contempt, and divers good people of this commonwealth, &c. &c., *viz.*, A, B, C, &c. &c., have since the speaking, &c." stating the circumstances with all convenient certainty.

Another count may then be added, varying the statement of the words, particularly if the witnesses do not agree on the precise terms in which the slander was uttered.

A third count may then follow, stating generally, that the defendant, intending to injure and defame the plaintiff, on a certain day, and at a certain place, in a certain discourse, which he then and there had, with divers good citizens of this commonwealth, of and concerning the plaintiff, falsely and maliciously charged the plaintiff with being guilty of the crime of —, and then conclude *as before*, or have one general conclusion to all the counts, containing the allegation of special damage, if it is expected to prove it. For directions in particular cases, reference must be made to the precedents.

2. Libel.

Where scandalous words, which, as before explained, are actionable with or without special damage, are committed to writing and published, the injury is greatly aggravated, and an action of Slander *a fortiori* may be maintained. It is for this reason, and because the malicious intention, and the consequent damages are both so much greater, that not only an action may be maintained for a libel at the suit of the injured party, but the offender is liable to be fined and imprisoned, if convicted on an indictment for the offence. For this cause also, many times, an action may be maintained for a libel, where the injurious expressions, if they had been spoken merely, would not have been actionable, without the allegation of special damages. 2 Wils. 403; 1 Bos. & Pul. 331; 4 D. & E. 126; 4 Taunt. 355; 1 T. R. 748.

The law has rendered a libel an indictable offence, to prevent men from having recourse to personal violence, to obtain redress for the injury done to their feelings. If any writing therefore has a direct tendency to superinduce a breach of the peace, it may be the ground of an indictment. But the object of the law, in enabling one to bring a civil action for a libel, is to furnish a remedy, by which he may recover damages for the injury, which his character and feelings may have sustained, in being held up to the public as an object of reproach, contempt, or ridicule. 2 Wils. 203; 2 Pick. 118. A publication having a direct tendency to do this, of whatever nature it may be, is actionable as well as indictable as a libel. And therefore, in a letter to a third person to call one a villain, is a ground of action; but, if a libelous letter is sent to the individual libeled, it is not actionable without further publication; though it is indictable. 1 Caines' R. 581.

The publication of a judicial proceeding, though it reflects on a man's character, is not a libel. 1 B. & P. 525; 8 T. R. 293.

What is a publication of a libel.

The sale or distribution of copies by the defendant, or by his shop-boy, if done openly and not clandestinely, in the course of his employment, or maliciously reading or singing the contents of the libel to others, is a sufficient publication. See 2 Bur. 2666.

If one procure another to publish a libel, such a person is a libeler, and the actual publisher is a *competent* witness to prove it. 7 East, 65.

Where a libelous letter is sent by post, it is a publication in any county to which the letter is sent. 1 Camp. 215.

To write down libelous matter, dictated by another is stated to be a publication. 5 Mod. 163. To transcribe a libel merely, is not.

To set up an effigy, or ridiculous or scandalous figure, emblem, picture, or sign, before a man's door, is a publication of a libel; but the application of it to the plaintiff, must be ascertained by sufficient inuendos and averments, and generally must be followed by a statement of special damage. 5 Co. 125.

If a libel is inserted at A's request in a paper published in an adjoining state, which usually circulates in the town of B, within the county of C, in this state, it is competent and conclusive evidence of a publication in the county of C. *Commonwealth v. Blanding*, 3 Pick. 304. See 7 East, 65.

For more on the subject of publication, see 3 B. & A. 714, 717.

Under the Revised Statutes of Massachusetts, actions for slander must be brought within two years from the time of speaking or publishing. ch. 120, sec. 20.

3. Slander of title.

This action may be maintained where a person is in treaty for the sale of an estate, or where it is set up at auction, and another, by false affirmations respecting his title, i. e. either, that he has no title to it, if he holds it by purchase, or that he is a bastard, if he claims by descent, or that the land is incumbered, under attachment, &c. so as to be of little value, prevents a sale of the land. Special damage must be averred by the plaintiff, as that he could not sell, or lease the land, &c. Cro. Car. 140; 2 Cro. 484.

This action, however, cannot be maintained, unless the words are spoken maliciously and are false. For if the defendant claims the land himself, and the words complained of, are the mere assertion of this claim, no action can be maintained, though his claim is unfounded. 1 Sal. 14; Cro. Eliz. 197, 427. Neither can it be maintained against counsel, for any opinion respecting the title, given to one who consults him. R. M. 167. This action, however, rarely occurs, and it seems that any person thus injured, in this country, must rely rather upon general principles to maintain his action, than upon the authority of judicial decisions, settled by our tribunals.

DECLARATIONS IN CASE FOR SLANDER.

For words containing a charge of forgery, &c.

For that whereas the plaintiff is a good, true, honest and

just citizen of this commonwealth, and from the time of his birth, hath hitherto always behaved and governed himself as such; and during all that time, hath been held, esteemed, and reputed to be of a good name, character and reputation, as well among a great number of his fellow-citizens as among all his neighbors and acquaintance; and, during all that time, hath never been guilty, nor justly suspected of having been guilty of any kind of forgery, cheating, deceit, or fraud, or any other such hurtful or disgraceful crime; and whereas the plaintiff, on &c., and long before was, and still is, a captain of a company of foot, in the first regiment, second brigade, and second division of the militia of the commonwealth aforesaid; and, during all that time, hath governed and conducted himself in his said office with uprightness, integrity, and honor; and whereas the said D, on the said — day of &c., and long before was, and still is, a person liable to do duty in said militia, and was one of the soldiers and members, of and in the said company of foot; yet the said D, well knowing all and singular the premises aforesaid, but contriving and maliciously intending to hurt, injure, and degrade the plaintiff in his aforesaid good name, character, and reputation, and in his said office, and to cause it to be believed, that he had acted unjustly, deceitfully, and dishonorably in his said office, and to subject him to the pains and penalties by the laws of this commonwealth provided against those, who commit any kind of cheating, forgery, or fraud, did, on the said — day of &c., in a certain discourse, which the said D then and there had with the plaintiff, in the presence and hearing of divers good and worthy citizens of this commonwealth, *of and concerning the plaintiff in his said office* and otherwise, falsely and maliciously say, speak, and publish these following false, scandalous, and defamatory words *to, of and concerning the plaintiff*, so being captain as aforesaid, in the presence and hearing of those citizens, to wit, “How came you (meaning the plaintiff) to send me (meaning himself the said D) such an account (meaning and intending thereby a certain memorandum or account, then before presented and delivered to the said D, by one of the sergeants of said company of foot, of and for sundry articles of arms and equipments wherein the said D as such soldier as aforesaid, and one of the members of said company, had been deficient at an examination or review of arms, then before had of and for said company.) You (meaning the plaintiff) forged it (meaning the said last

mentioned memorandum or account;) you (again meaning the plaintiff) might as well have forged an account or note of hand against me," (again meaning himself, the said D;) and further meaning and insinuating by the several words aforesaid, that the plaintiff had been guilty of forgery, and had otherwise acted unjustly, deceitfully, and dishonorably in his said office.

2d COUNT. — Setting out the words differently.

And the plaintiff in fact further says, that, afterwards, to wit, on &c., at &c., in a certain other discourse which the said D, then and there had with divers other good and worthy citizens of this commonwealth, of and concerning the plaintiff in his said office, and otherwise, the said D with the malicious contrivance and intention aforesaid, and for the several purposes aforesaid, did falsely and maliciously say, speak, and publish of and concerning the plaintiff, so being such captain, as aforesaid, in the presence and hearing of those last mentioned citizens, these other false, scandalous, and defamatory words following, to wit; "He (meaning the plaintiff) has forged his muster-roll (meaning thereby the roll of the said company, which the plaintiff, as such captain and commanding officer of said company, was obliged by law to keep,) by interlining it, (again meaning the said roll,) I (meaning the said D) don't know what you call it; I (again meaning himself) call it forgery; further meaning and insinuating by the several words last aforesaid, that the plaintiff had been guilty of forgery, and had likewise acted unjustly, deceitfully, and dishonorably in his said office.

3d COUNT. — Setting out the words differently.

And the plaintiff further says, that afterwards, to wit, on &c., at &c., in a certain other discourse, which the said D then and there had with divers other good and worthy citizens of this commonwealth, of and concerning the plaintiff, in his said office and otherwise, the said D with the malicious contrivance and intention aforesaid, and for the several purposes aforesaid, did falsely and maliciously say, speak, and publish of and concerning the plaintiff, so being such captain as aforesaid, in the presence and hearing of those last mentioned citizens, these other false, scandalous and defamatory words following, to wit; "He (meaning the plain-

tiff) has been guilty of forgery; and I (meaning himself the said D) can prove it and mean to ; (meaning thereby, that he intended to prosecute the plaintiff, and procure him to be indicted for the said crime of forgery;) and mean to break him, (meaning the plaintiff, and further meaning, that he intended to procure the plaintiff to be tried, as such captain as aforesaid, by a court-martial, and to be thereby removed from his said office,) and take away his commission (meaning the plaintiff's commission as such captain as aforesaid;) for he (meaning the plaintiff) is not fit to command a company;" further meaning and insinuating by the several words last aforesaid, that the plaintiff had been guilty of forgery, and had otherwise acted unworthily, unjustly, deceitfully, and dishonorably in his said office.

4th COUNT. — Setting out the words differently.

And the plaintiff in fact further says, that afterwards, to wit, on &c., at &c., in a certain other discourse, which the said D then and there had with divers other good and worthy citizens of this commonwealth, of and concerning the plaintiff in his said office, and otherwise, the said D, with the malicious contrivance and intention aforesaid, and for the several purposes aforesaid, did falsely and maliciously say, speak, and publish of and concerning the plaintiff, so being such captain as aforesaid, in the presence and hearing of those last mentioned citizens, these other false, scandalous, and malicious words following, to wit, "Captain B (meaning the plaintiff) was guilty of forgery."

5th COUNT. — In general terms for charging the plaintiff with forgery.

And the plaintiff in fact further says, that afterwards, to wit, on &c., at &c., in a certain other discourse, which the said D then and there had with divers other good and worthy citizens of this commonwealth, of and concerning the plaintiff, the said D, with the malicious contrivance and intention aforesaid, and for the several purposes aforesaid, did falsely and maliciously, openly and publicly charge the plaintiff with the crime of forgery, in the presence and hearing of those last mentioned citizens.

General Conclusion.

By means of the speaking and publishing of which said several false, scandalous, and defamatory words, and of the said false and malicious charge, the plaintiff is further great-

ly injured and prejudiced in his good name, character and reputation aforesaid, and has been suspected and believed to have acted unworthily, unjustly, deceitfully, and dishonorably in his said office, and has been rendered liable to be presented and indicted for the crime of forgery, and has likewise further undergone great pain, distress and trouble, both of body and mind, and has been otherwise greatly injured and prejudiced. *Essex Nov. Term, Bartlett v. Haskell, S. J. C. 1801.* T. PARSONS & C. JACKSON.

NOTE. The declaration in slander may either lay the words spoken, or set out the substance of the words. If the substance only (as in the fifth count of this declaration) be set out, as that the said D charged the plaintiff with such a crime, then it is sufficient to prove the substance. *Nelson v. Dixit, Cas. Temp. Hard. 305.* But if the very words are laid, they must be proved as laid; though a slight variation, if agreeable in substance, would not vitiate. *Ibid.* So if immaterial words are proved to be spoken, more than laid in the declaration. *Ibid.* So if the words are laid, *you* are so and so; and the words proved are, *he* is so and so; such variance is immaterial. *Ibid.* But *quare* as to this last; for Ld. Mansfield, in the case of *Avarillo v. Rogers*, ruled the contrary. Bull. N. P. 5; Esp. N. P. 521; so, on indictment, where the words were alleged to be spoken of the prosecutor, and proof of words spoken to him, it was adjudged a fatal variance. 4 T. R. 217. So proof of words spoken interrogatively, will not support a count for words spoken affirmatively. 8 T. R. 150. So if the words laid are, I will hang *him*; and the words proved are, I will hang *them*; it is a material variance. Cas. Temp. Hard. 305. On the whole, therefore, the last seem the better opinions. (MSS.)

Against two for conspiring together to charge the plaintiff, a single woman, with incontinence, with special damage.

For that the plaintiff is a modest and chaste virgin, and, at the time of the conspiracy and accusation, hereinafter mentioned, was a menial servant of A B, and a person of good character and reputation; nevertheless, the said D and E, well knowing the premises, of their own mere malice, conspiring together to defame and injure the plaintiff, and to deprive her of her said place and service, while she was a menial servant of the said A B, as aforesaid, *viz.* on &c., at &c., in pursuance of their said conspiracy, did falsely and maliciously, in the presence and hearing of divers good citizens of this commonwealth, falsely, maliciously, and without any probable cause whatever, accuse the plaintiff of committing fornication with the said D; by reason of which said false and malicious accusation, the plaintiff was put and turned out of the service of the said A B, and is thereby deprived of the means of getting her living, &c. (*Altered from English MSS.*)

*For words charging a single woman with incontinence, special damage,
loss of marriage.*

For that whereas, the plaintiff now is a virgin and a chaste woman, and from the time of her nativity hath been so, and hath been accounted, esteemed and reputed as such among her neighbors, as well as of good reputation and fame by all other good people, and hath all her lifetime continued untouched and unsuspected of the atrocious crimes of adultery, or fornication, or any such other enormous crimes; whereby many good people have, at sundry times desired to take the said plaintiff to be their wife, and in particular one C C, who, at the time of speaking the false and scandalous words hereafter mentioned, was lawfully outpublished to the said plaintiff. Nevertheless, the said E, though well knowing the premises, but contriving maliciously and wickedly to injure and defame the plaintiff in her good name and reputation, and to bring her to disgrace and infamy, and to deprive her of her marriage with said C C, and to subject her to the penalties and punishments provided by law in cases of adultery and fornication, on &c., at &c., in presence of divers good people of this commonwealth, did loudly and publicly speak, utter and repeat the following false, malicious and scandalous words *of and concerning the plaintiff*, to wit, "that she (meaning the plaintiff) was a whore to a man that courted her," (i. e. the plaintiff;) and of her further malice, did then and there, in presence of divers good people, falsely and maliciously publish and declare, "that she (meaning the plaintiff) had a husband in Ireland;" and of her further malice, on &c., at &c., in the presence and hearing of divers good people, did pronounce, utter and publish the following false and scandalous words, to wit, "that her sister's apparition (meaning the apparition of the sister of the plaintiff) appeared to me (meaning the said E) that night before, and told me (meaning the said E) that she (meaning the plaintiff) was a damned whore, and that she (meaning the plaintiff) had lodged with her brother [meaning the said E's brother] that night;" by means of which false, scandalous and malicious words so spoken and published, the plaintiff hath fallen into disgrace, contempt and infamy with several persons, with whom previously she was in great esteem; and also the said C C, who had solicited her in marriage, and to whom she was outpublished as aforesaid, hath since neglected and utterly refused to marry her, the plaintiff, and still continues so to do; whereby

the plaintiff hath not only lost her credit and reputation, but hath also lost her preferment in marriage, &c.

On words containing a charge of theft.

In a plea of the case; for that the plaintiff is, and from his youth hath been, of good fame and reputation among his neighbors for honesty and propriety of conduct, and is, and ever has been, wholly free from the atrocious crime of stealing, and was never convicted or suspected to be guilty of that crime, but hath always maintained himself by honest and industrious attention to his trade and calling; nevertheless, the said D, not being ignorant of the premises, but fraudulently, maliciously and wickedly contriving to injure, blacken and defame the plaintiff in his good fame and reputation, and to injure him in his trade, and to expose him to the pains and penalties prescribed by law for stealing, did, on &c., at &c., in presence of divers good citizens of this commonwealth, and in conversation with the same, with a loud voice, speak, utter and publish the following false, scandalous and malicious words, *of and concerning the plaintiff*, to wit, "well enough S [meaning the plaintiff] may buy horses; for it has not cost him [meaning the plaintiff] two dollars to live these two years; for he [meaning the plaintiff] has plundered from almost every body he [meaning the plaintiff] has worked for; he [meaning the plaintiff] has been caught stealing a number of times;" by means of which false and scandalous words, the plaintiff has been much injured in his good name and reputation, and is and has been exposed to a prosecution for stealing, and has suffered great anxiety of mind; and one C C, who would have otherwise employed the plaintiff to work for him, at his, the plaintiff's, trade, whereby the plaintiff would have made a large sum of money, to wit, the sum of &c., now wholly refuses so to do; all which is to the damage &c.

By a trader, for words charging the plaintiff with bankruptcy, &c.

For that whereas the plaintiff is and ever has been a good, honest, and faithful citizen of this commonwealth, and was of good fame and reputation among his neighbors, and for many years now last past, hath used and yet uses the trade or mystery of a mercer, and in the same art, without any covin, fraud, or bankruptcies, or any other crime, hath hitherto conducted himself, and by reason of his honest and just payment of his debts, hath gained great credit and es-

teem among his creditors and neighbors ; yet the said D, not being ignorant of the premises, but contriving to oppress and injure the plaintiff in his good name, and to hurt and traduce the plaintiff in his trade aforesaid, on &c., at &c., in the presence of divers good people of this commonwealth, openly and publicly *speaking to the plaintiff*, uttered the following false, malicious, and scandalous words, to wit, "thou [meaning the plaintiff] art a bankrupt, a rascal, a drunkard, and one of no credit;" by speaking and publishing of which false and scandalous words, the plaintiff is greatly injured, not only in his good name, but in his honest trade and dealings in buying and selling, is egregiously damaged, &c. *Vide 6 T. Rep. 693.*

By a trader for words implying that plaintiff was a bankrupt.

For that whereas the said plaintiff is a good, true, and faithful citizen of the U. S., and now and for divers years last past, hath used and yet doth use the art and mystery of a merchant, and as a faithful buyer and seller in the same art and mystery in bargaining, buying and selling, hath behaved himself all that time, as a true and faithful citizen of the said U. S., and hath always been held and reputed, among his fellow-citizens and others, to be of good name, fame, and reputation, and in the said art and mystery, his credit, promises, and true and faithful payment of his debts at all times without any mark of falsity, deceit, breaking or shutting up, or becoming a bankrupt, hath kept, performed, and fulfilled, and by these means hath acquired and enjoyed great reputation, and thereby hath daily and honestly gained and obtained a maintenance and support for himself and his family ; nevertheless the said D, in no wise ignorant of the premises, but maliciously and wickedly intending to injure and destroy the good name, credit, and reputation of the said plaintiff, so that the said plaintiff might be esteemed a bankrupt by his creditors and fellow-citizens, did on &c., at &c., in the presence and hearing of many of the good citizens of the U. S., speak, utter, and publish the following false, feigned, and scandalous words, to wit, "he [speaking of and meaning the plaintiff] has shut up his [meaning the plaintiff's] stores;" meaning thereby that the plaintiff had become a bankrupt, and was unable to pay the just debts which he owed ; by the speaking and publishing of which false, feigned, and scandalous words, the said plaintiff is greatly in-

jured in his good name, credit, and reputation, and likewise in his art and mystery aforesaid; and many of his fellow-citizens* have, by reason thereof, caused his goods and estate to be attached, whereby he is in danger of losing the confidence of his fellow-citizens, and of being, in other respects, greatly injured and distressed, to the damage &c.

For words containing a charge of perjury.

For that whereas the said plaintiff is a good, true, and honest citizen of the said commonwealth, and, from the time of his nativity, hath hitherto behaved and governed himself, as such, and, during all that time, hath been held, esteemed and reputed of a good name, character and reputation, as well among a great number of his fellow-citizens, as among all his neighbors and acquaintance, and during all that time hath been free from the atrocious crime of falsely swearing and perjury; nevertheless, the said E, in no wise ignorant of the premises, but contriving and maliciously intending, not only to injure the said plaintiff, and deprive him of his good name, character, and reputation, but also to cause the said plaintiff to be brought under the pains and penalties of the law provided against false swearing and perjury, at &c., on &c., speaking to the said plaintiff, in the presence and hearing of many of his fellow-citizens, falsely and maliciously, openly and publicly, and with a loud voice, pronounced and published the following false, feigned, and scandalous English words of the said plaintiff, to wit. "You [meaning the said plaintiff] are a foresworn rascal. You [meaning the said plaintiff] are a perjured villain; and I [meaning the said E] can bring a thousand men to swear it, and the whole town [meaning the said town of——] have made songs of you [meaning the said plaintiff] being a perjured villain;" by means of publishing which said false, feigned, scandalous, and malicious words, he, the said plaintiff, is not only injured and prejudiced in his good name and reputation, but has been liable to be presented for perjury, and has undergone great fatigue and bodily labor to falsify the said rumors spread of him, the said plaintiff, and also many of his good fellow-citizens more and more withdraw themselves from the acquaintance of the said plaintiff, to the damage &c.

* If it is intended to introduce evidence of such attachments, they should be alleged circumstantially, i. e. with the names of persons, and a proper allegation of time and place.

By a trader for calling plaintiff a bankrupt, &c., cheat, &c.

For that whereas the said plaintiff, from his childhood hitherto hath been a person of good credit, fame and reputation, and a person of integrity and justice in all his business, trade, and commerce with all men; and, for more than twelve years last past, hath been a merchant of extensive trade and commerce, with many worthy and great merchants in divers parts beyond sea, as well as in this land, and an usual underwriter of policies of insurance in &c. aforesaid, whereby he hath made great profit and gain; nevertheless the said E, not ignorant of the premises, but maliciously contriving and intending to ruin the plaintiff's reputation and good character, and to deprive him of his commerce and business aforesaid, and of all profit and gain to be made thereby, did, at &c. aforesaid, on &c., in the presence and hearing of many of our *liege subjects** falsely, maliciously, and with a loud voice, speak and utter the following false and scandalous words of and concerning the said plaintiff, to wit, W F (meaning the plaintiff) is a very great *villain*, a *rogue*, a *scoundrel*, a *bankrupt*, not worth a *groat*, not able to pay his debts, and is *thousands* worse than nothing. And the said E continuing his malice against the said plaintiff, did there, on &c., in the hearing of divers good people, falsely, maliciously, and with a loud voice, speak and utter the following false and scandalous words concerning the plaintiff, to wit, W F (meaning the plaintiff) is a *villain*, a *scoundrel*, a *rogue*, a *cheat*, a *bankrupt*, not worth a *groat*, not able to pay his debts, and is *thousands of pounds* worse than nothing. And the said E thereafterwards, on the same day, in the presence and hearing of many good people, falsely, maliciously, and with a loud voice, spake and uttered the following false and scandalous words of and concerning the plaintiff, to wit, W F (again meaning the plaintiff) is a *great villain*, a *rogue*, a *scoundrel*, a *bankrupt*, not worth a *groat*, his *house and farm* (meaning the plaintiff's house and farm) will not half pay his *debts*, he is not able to pay his *debts*, owes more than he is *worth* and is *thousands* worse than nothing. And the said E continuing his malice aforesaid against the plaintiff, did on &c., at &c., in discourse with divers persons concerning the plaintiff, falsely and maliciously say of him, the plaintiff, in their hearing, these false and scandalous words, to wit, he [speaking of, and meaning the plaintiff] is a *vile*

* Citizens of this Commonwealth.

fellow, a rogue, a man of bad principle, a base fellow, a very great rogue, a rascal, a scoundrel, a vile scoundrel, a very great scoundrel, a bankrupt, a cheat, a cheating knave, a fellow of no honor, owes more than he is worth, is not able to pay his debts and is thousands worse than nothing. And the said E thereafterwards on the same day, continuing his malice against the plaintiff, did, in the presence and hearing of divers of our *liege subjects*,* falsely, maliciously, and with a loud voice, speak and utter the following false and scandalous words of and concerning the plaintiff, to wit, W F [meaning the plaintiff] is a *vile fellow, a rogue, a great rogue, a very great rogue, a cheat, a great cheat, a shuffling rascal*, and his [meaning the plaintiff's] *credit* is not worth a *groat*; he [meaning the plaintiff] is a *rascal, a scoundrel, a mean, pitiful fellow, a great cheat*, and no person would give *sixpence* for any *debt* he owes, (meaning the plaintiff owed) to give any thing for it; for he (meaning the plaintiff) is not able to pay his *debts*, he (meaning the plaintiff) owes more than he is *worth*, and *I can prove it*; and he (meaning the plaintiff) cannot pay his *debts*, is *worse than nothing*, is *thousands* worse than nothing, and owes more than he is *worth*. And the said E, on &c., of his further malice, in the hearing of divers worthy and good people, did, at &c., utter and speak, of and concerning the plaintiff, these false and scandalous words, to wit, W F (meaning the plaintiff) is a *rogue, a bankrupt, a cheat, and a villain*; he (meaning the plaintiff) *bottomed a ship* for more than she was worth, and *cast her away* on purpose to cheat the bottomers. And at another time, he (still meaning the plaintiff) *bought an old ship that had been condemned*, purely to send his brother in (meaning the plaintiff's brother) to be cast away, in order to get his brother's interest and estate then depending in the family, (meaning his said brother's proportion and share in his father's estate, then depending in the law;) and if his *father* (meaning the plaintiff's father) and all the *friends* he (meaning the plaintiff) had in the world were on board (meaning on board the said ship,) he (meaning the plaintiff) would have cast her away. He (meaning the plaintiff) is a *mean spirited, ungenerous fellow*, and loves money so well, that he never did a *generous* action in his life. And the said E thereafterwards, on the same day, of his further malice, did, in the hearing of divers of our *liege subjects*,* utter and speak the following false and scandalous words, of and

* Citizens of this Commonwealth.

concerning the plaintiff, to wit, W F [meaning the plaintiff] is a *mean spirited, ungenerous fellow*, and loves money so well, that he never did a good or generous action in his life; he (meaning the plaintiff) is a *rogue*, a *villain*, a *bankrupt* and a *cheat*; he (meaning the plaintiff) *bottomed* a ship for more money than she was worth, and cast her away on purpose to cheat the bottomers; and he (meaning the plaintiff) bought an old condemned ship, purely to send his *brother* in it to be cast away; that he (meaning the plaintiff) might get by it, because there was an estate depending in the family (meaning in the family of the plaintiff's late deceased father,) and if his father (meaning the plaintiff's father) and *all the friends* he had (meaning the plaintiff had) in the world, were on board (meaning on board the said ship,) he (meaning the plaintiff) would have cast her away. And the said E, on &c., at &c., of his further malice against the plaintiff, speaking of and concerning the plaintiff, in the hearing of many of our liege subjects,* did speak and utter the following false and scandalous words concerning the plaintiff, to wit, *I hope he* (meaning the plaintiff) *will recover money enough* out of the prize in *England*, to pay his *debts* (meaning the plaintiff's debts;) but if he (meaning the plaintiff) doth recover enough, it must be a *very large sum*, he (meaning the plaintiff) *owes* more than he is *worth*, and is not able to pay his *debts*. And the said E, on &c., at &c., speaking of the plaintiff's conduct in his trade, dealings, and merchandise, did of his further malice, speak and utter the following false and scandalous words of and concerning the plaintiff, in the presence and hearing of divers of our good subjects,* to wit, he [meaning the plaintiff] is a *vile fellow*, not fit for society, a *cheat*, a *rogue*, and is *as great a rogue and villain as lives*; he [again meaning the plaintiff] is *as great a rogue and villain as is in the world*. And the said E, on &c., at &c., upon a discourse had and moved concerning the plaintiff's conduct in his trade, merchandise, and dealings, in the hearing of divers of our liege subjects,* of his further malice against the plaintiff, did speak and utter the following false and scandalous words concerning the plaintiff, to wit, he [meaning the plaintiff] is *not fit company for any man*; he [meaning the plaintiff] is a *rogue*, a *bite*, a *cheat*, a *cheating*, *dishonest villain*, a *knave*, a *scoundrel*, and *I can prove it*. By reason of the speaking of which false and scandalous words in manner as aforesaid,

* Citizens of this Commonwealth.

the plaintiff hath greatly suffered in his good name and reputation, and lost the good-will and esteem of many worthy persons of great note, wealth, and business, with whom he before had large and very profitable tradings in merchandise, who of late have refused to entrust the plaintiff with their affairs and business, or to continue or carry on any commerce with him, to the damage, &c. *Fletcher v. Vassal, Suffolk, S. C., Aug. T. 1752.* E. TROWBRIDGE.

NOTE. The special damage here should be alleged with more certainty, if it is intended to introduce evidence of it; *e. g.* "and many persons &c., viz. A, B, C, D and E, with whom the plaintiff, before the speaking of the said false, scandalous, and malicious words, had large dealings, from which he derived great advantage and profit, have since, and on account of the speaking of the said words, and for no other reason whatsoever, wholly refused to entrust the plaintiff with their affairs and business," &c.

For a libel by letter intimating the plaintiff to be insolvent.

For that whereas the plaintiff, at the time of writing and publishing the several false, scandalous, and defamatory words, hereinafter mentioned, had been and was a merchant, and sought his living by buying and selling, and had always conducted himself with fairness and punctuality towards his creditors; and till then had never been suspected of bankruptcy, insolvency or any fraudulent intention, and always had been, and then was, in good circumstances, credit and esteem, viz. at &c. aforesaid; yet the said E, well knowing the premises, but envying the happy condition of the plaintiff, and maliciously contriving and intending to degrade and injure the plaintiff, in his good name and credit in his business aforesaid, and to cause him to be reputed as worthy of no credit, and also to prejudice and injure the plaintiff with one M H, a trader at &c., who for a long time had dealt with, and was then dealing with the plaintiff, in the way of his trade; and to induce the said M H to leave off dealing with the plaintiff, on &c., at &c., did falsely and maliciously, write and publish a certain scandalous and malicious libel of and concerning the plaintiff, in his aforesaid business, in the form of a letter directed to the said M H, containing therein this false, scandalous, malicious, and defamatory matter following of and concerning the plaintiff in his business aforesaid; "Sir, you (*meaning the said M H*) will be surprised to see a stranger write to you (*meaning the said M H*), but as I (*meaning himself, the said E*), have no other view but doing as I (*again meaning himself, the said E*),

would be done by, therefore as I (*again meaning himself, the said E,*) believe you (*again meaning the said M H*) are a fair trader, therefore cannot see you (*meaning the said M H,*) wronged without letting you (*again meaning the said M H*) know it, for I (*again meaning himself, the said E,*) am told you (*meaning the said M H*) have large dealings with one S W [*meaning the plaintiff*] and he [*meaning the said plaintiff*] was a bankrupt some years before [*meaning before the writing and publishing of the said libel,*] and never could get his [*meaning said plaintiff's*] certificate; so all that he [*meaning the said plaintiff*] has or deals for, is his [*meaning the plaintiff's*] former creditors' right, and he [*meaning the plaintiff*] has not been in business above three quarters of a year, and now is joined with his [*meaning the plaintiff's*] brother [*meaning one G W,*] and J M [*meaning one J M,*] and they [*meaning the said plaintiff, G W and J M*] get all the credit they [*meaning the said plaintiff, G W and J M*] can, by one [*meaning one of the three last mentioned persons*] recommending another [*meaning another of those three last mentioned persons,*] and they [*meaning the said plaintiff, G W and J M*] are arrested every day, &c. &c.; to brail one another and pay nobody, so now I (*meaning himself, the said E,*) have done my [*meaning his, the said E's,*] part, and if you [*meaning the said M H*] are not the man it [*meaning the said letter or libel*] was designed for, pray burn it [*meaning the said letter or libel,*] and if you [*meaning the said M H*] take the hint, burn it [*meaning the said letter or libel,*] for the writer [*meaning the writer of the said letter or libel*] is neither to get nor lose by it; so farewell." And the said E, on the same day, at &c. aforesaid, wrongfully, falsely and maliciously sent the said libel in the form of a letter, unto the said M H, and the same was by reason thereof, received and read by the said M H, as thereby published by the said E, to the said M H; by means of the writing and publishing of which said false, scandalous, malicious and libelous matters, the plaintiff is not only much hurt and prejudiced in his good name, credit, and esteem in his aforesaid business; but also is fallen into great discredit amongst his creditors, and other worthy persons, with whom he had dealt and traded in his aforesaid business, and of whom the plaintiff was accustomed to buy goods and merchandise on credit, without ready money; and especially the said M H, insomuch that those creditors and other persons, and especially the

said M H, on occasion of the writing and publishing of the said libel, have altogether refused, and still do refuse, to buy or sell, or have any thing to do with the plaintiff in his business aforesaid, &c.

For a libel. By husband and wife, for charging the wife with slander, falsehood, &c.

In a plea of Trespass on the Case, for that whereas the said S now is, and from the time of her birth hitherto has been, a good, pious, virtuous and honest subject of this commonwealth, and has always, during all the time aforesaid, behaved and governed herself as such; and, until the time of the writing and publishing of the false, scandalous and malicious libel hereinafter mentioned, has always been, and was always reputed and esteemed, among all her neighbors and divers other good and worthy citizens of this commonwealth, to be a person of good name, fame, credit and reputation, to wit, at said N; and she, the said S, has never been guilty, nor until the time of the writing and publishing of the said false, scandalous and malicious libel, suspected to have been guilty of slander or lying, or of any other such hurtful and noxious crime, or of any grossly base and immoral conduct; and the said W, and S his wife, before the time of the writing and publishing of the said false, scandalous, and malicious libel, were used to live quietly and happily together, and to enjoy great happiness in their married state; yet the said D, well knowing the premises, but contriving and maliciously intending to prejudice, degrade, and injure the said S, in her aforesaid good name, fame, credit, and reputation, and to hold up and expose her to public infamy and disgrace, contempt and hatred, and to disturb and destroy the domestic peace and happiness of the said S, in her family, and also, to subject her to the pains and penalties, by the laws of this commonwealth, made and provided against, and inflicted on persons guilty of slander or lying, or other grossly base and immoral conduct, did on &c., at &c., falsely, maliciously, and scandalously, write and publish, and cause and procure to be written and published, a certain false, scandalous, and malicious libel, of and concerning the said S, containing therein the false, scandalous, defamatory, and opprobrious matter following, of and concerning the said S; that is to say, "To all whom it may concern. A few plain truths and undeniable facts. S. D. [*meaning the above named S, wife of W. D., of &c.,*] has made and

propagated, and still persists in publishing an absolute falsehood respecting me [*meaning himself, the said D.,*] viz. that while resident at N, I [*meaning himself, the said D.,*] punished my servant-girl for lying, by tying her tongue to her toe with a thread or cord; I [*meaning himself, the said D.,*] have been advised by several of my friends, to bring this obnoxious woman [*meaning the said S*] to merited and exemplary justice [*meaning thereby that the said S was liable and ought to be punished for the crimes of lying and slander;*] accordingly I [*meaning himself, the said D.,*] have intended and threatened to prosecute her [*meaning the said S,*] and still hold myself [*meaning himself, the said D.,*] in readiness to do it [*meaning to prosecute the said S,*] provided my friends [*meaning his, the said D's, friends,*] shall not think the following reasons for declining a prosecution sufficient and satisfactory. 1st. Said S [*meaning the said S. D.*] can be proved a gross and common liar and slanderer, in various other instances, in which there appears to have been no reason, provocation, or temptation to influence her [*meaning the said S's*] false and scandalous tongue [*further meaning and insinuating thereby, that the said S, before the time of the writing and publishing of the said libel, had been, and was frequently and repeatedly, guilty of the base and atrocious crimes of lying and slander, and that she, the said S, had, before that time, falsely, maliciously, and wickedly, slandered and defamed the character of him, the said D, and the character of divers other persons.*] 2d. Her [*meaning the said S's*] character and conduct, in other respects, are grossly base and immoral [*meaning and insinuating thereby, that the said S, before the time of the writing and publishing of the said libel, had been guilty of divers gross and base crimes and vices, other than and besides the aforesaid crimes of lying and slander, and that, in her conduct and behavior, she was not influenced nor governed by any just sentiments or principles of religion, morality, or honor.*] Hence, 3d, I [*meaning himself, the said D.,*] think it dishonorable to appear as a party in a legal process with one [*meaning the said S,*] whose character is thus infamous and contemptible [*meaning and insinuating thereby, that, by reason of the several crimes, vices, matters and things which he, the said D, had so, as aforesaid, falsely and maliciously, charged and alleged against her, the said S, above in the*

said libel, the character and reputation of her, the said S, was and had become infamous and contemptible.) If any person or persons wish to know particularly the foundation of this statement (*meaning the several matters and things there above in the said libel contained, as aforesaid,*) by calling on me (*meaning himself, the said D,*) they (*meaning such last mentioned person or persons*) shall be furnished with full and unquestionable demonstration of the truth of the above facts: (*meaning thereby and insinuating, that the said S had actually been guilty of the said atrocious crimes of lying and slander, and of the said divers other gross and base crimes and vices.*) If the abovenamed infamous woman (*meaning the said S, and further meaning and insinuating thereby, that she, the said S, was of an infamous character and reputation,*) or any of her (*meaning the said S's*) beloved friends and privy counsellors, shall consider the above representation (*meaning the several matters and things there above in the said libel contained as aforesaid*) as unfounded, I (*meaning himself, the said, D,*) pledge myself (*meaning the said D*) to support it, whenever legally called to do so: (*meaning thereby and insinuating, that the said S had actually been guilty of the said atrocious crimes of lying and slander, and of divers other gross and base crimes and vices, and that he, the said D, could prove that she, the said S, had been guilty thereof as aforesaid.*) Regard to the cause of truth, which always suffers by the forked tongue of falsehood, a proper respect to my own (*meaning his, the said D's,*) character, peace, and usefulness, and tenderness for the good name of those, who have already suffered, and of others who are equally liable to suffer by the unprovoked malice and brazen impudence of this common liar (*meaning the said S, and thereby further meaning and insinuating, that the said S had, before the time of the writing and publishing of the said libel, falsely, maliciously, and wickedly slandered and defamed the character of divers persons, and that she was, and frequently had been, guilty of the crimes of lying and slander,*) are my (*meaning his, the said D's,*) apology for this publication of her (*meaning the said S's*) true character: (*further meaning thereby and insinuating, that the said S had been actually guilty of the said atrocious crimes of lying and slander, and of the said divers other gross and base crimes and vices.*) C. D. &c. — P. S. If any difficulty should appear in reconciling the above character of S. D.

(meaning the several matters and things there above in the said libel contained as aforesaid, of and concerning the said S) with the verbal recommendation I *(meaning himself, the said D,)* gave her *(meaning the said S)* when she *(meaning the said S,)* left my *(meaning his, the said D's,)* employ, the solution is, that her character *(meaning the said S's character)* has become thus notoriously obnoxious since her *(meaning the said S's)* connexion with W D. *(meaning the above named W D.* It is presumed, that enough is here said, to satisfy the candid and unprejudiced. With regard to persons of an opposite temper, it is neither my *[meaning his, the said D's,]* object nor hope to satisfy them in this or any thing else." And the said D thereafterwards, on &c., wrongfully, falsely, and maliciously, sent and delivered, and caused to be sent and delivered, the libel aforesaid, unto one E O, in &c., and the same libel was, by means of such sending and delivery thereof, received and read by the said O, and by divers other persons, as thereby published by the said D to said O, and to the said other persons; by means of the writing and publishing of which said false, scandalous, and malicious libel and libelous matters by the said D, of and concerning the said S, she, the said S, is greatly prejudiced, degraded, and injured in her aforesaid good name, fame, credit, and reputation, and is held up, exposed, and brought into public infamy, disgrace, contempt and hatred; and, by reason of the premises aforesaid, divers good and worthy citizens and subjects of the said commonwealth, to whom the innocence and integrity of the said S, in the premises, were unknown, have, on occasion of the writing and publishing of the said libel, from thence hitherto refused, and still do daily more and more refuse, to have any acquaintance or discourse with her, as they were before accustomed to do; and by means of the writing and publishing of the said libel, as aforesaid, the domestic peace and happiness of the said S, in her family, have been greatly disturbed, and she has suffered great anxiety and distress of mind, and has been rendered liable to be prosecuted for the crimes of lying and slander, and for the said divers other gross crimes and vices, and immoral conduct and actions, and she has been greatly injured and prejudiced in many other respects.

4. *Action on the Case for Deceit.*

This action may be maintained wherever one practises any deceit to the injury of another, as playing with false dice, or cheating at cards, and in this way winning his money; and generally, in all cases where money is obtained from another by false pretences, this action, as well as an action for money had and received, may be maintained. It lies also where one man personates another, and in his name does any act to his prejudice.

It lies also against a man for acting deceitfully in his trust, or office, or business, or trade; as if an attorney should betray the interests, secrets, &c. of his client; or an officer should make a false return of process; or a surgeon should make rash experiments on his patient; (*see* 2 Wils. 359;) or a trader should sell goods, knowing them to be of a bad quality, as of a good quality; as false or counterfeit jewels, &c. for real and genuine, &c. But it does not lie for a false affirmation respecting the value or price. 1 Lev. 102; 1 Sid. 146.

This action may be maintained against an infant for a false affirmation that he is of age, whereby he obtains money, &c. *See* 1 Sid. 183; *quære*.

So if a man sells goods belonging to another, as his own, and with or without an express warranty, that they are his, this action may be maintained. 6 Johns. R. 181. And even although the money has not been paid, and the real owner has not taken away the goods. 2 Cro. 474; 9 H. 7, 21, b.; 2 Esp. R. 417. Where A sells goods not *in his possession*, without an *express* warranty of ownership, if they are not his goods, it will be safer to bring Assumpsit for money had and received, to recover back the purchase money.

This action may be maintained against the master, for the deceitful act of the servant in the course of his employment, though without the master's knowledge. 1 Salk. 282; 2 Salk. 440; Str. 653. But if the servant act contrary to the express directions of the master, the servant alone is liable. 2 Salk. 442.

This action will also lie, for *falsely* representing a person to be in good circumstances, with an *intention to deceive*, by reason of which another person trusts him and loses his debt. 3 D. & E. 51; 6 Johns. R. 181. And it seems, that where there is a fraudulent *suppressio veri* in a representation, it may be equivalent to such gross falsehood, as to sustain an action. 1 East's R. 318; 6 Johns. R. 181.

Where this action cannot be maintained.

Where there is an express warranty, it is commonly safest, as well as most agreeable to analogy, to declare in Assumpsit, though in many cases Deceit may also be maintained. For it is very possible, that the warranty may be false or not complied with, without any intention to deceive on the seller's part, but in Assumpsit, the plaintiff recovers for the breach of the express warranty, whether there was any intention to cheat or deceive, or not.

The gist of the action of deceit consists of falsehood and an intention to deceive or defraud, and wherever either of these is wanting, in strictness, the action of deceit cannot be maintained; and though there are cases apparently inconsistent with this principle, where the action has been sustained without any fraudulent intent *in fact*, yet, on

an examination of the pleadings in such cases, it will be found, that fraud or deceit is always alleged, and the circumstances of the case amount technically to deceit or fraud, however free they may be from moral turpitude.

In some cases, however, where there is an intention to deceive, and the plaintiff is actually deceived, he cannot maintain an action for it; as if the deceit is of such a nature as could impose on no one without gross negligence, carelessness, or inattention, this action will not lie. For even an express warranty will not extend to defects obvious to the buyer's senses.

If there is an intention to deceive, but the plaintiff in fact is not imposed on, being acquainted with the real state of things, no action can be maintained for a false representation. 2 East's R. 92; 8 Johns. R. 19.

If the plaintiff is deceived by a false representation, which however was made honestly, and under a mistaken belief, he cannot recover. Peake's Cases, 226.

Lord Kenyon, in the last cited case, lays down the rule in such cases, thus, "it must appear, that the lie was told *for the purpose of imposing on the plaintiffs*, and that they, relying on that information, were deceived.

DECLARATIONS IN CASE FOR DECEIT.

Selling adulterated wine, warranting the same to be good.

For that whereas the said D, at &c. on &c. in consideration of &c., by the plaintiff to the said D, then and there in hand paid, did bargain and sell unto the plaintiff one tun of wines; and upon making said bargain and sale, the said D did then and there warrant the said wines to be good and perfect wines and in good condition; yet the plaintiff avers, that the said wines were at the time of said bargain and sale, corrupted and adulterated wines, and if drank, hurtful to man's body; whereby the plaintiff, upon said bargain and sale and warranty, was then and there greatly deceived and defrauded, &c. *Bohun*, 240.

Deceit in the quantity of liquor sold.

For that the said D, at &c., on &c., falsely and scandalously deceived the plaintiff, by then and there selling him, the plaintiff, a certain quantity of spirituous liquor, called &c., as and for the quantity of two gallons, and then and there warranting the same to be, and to contain in itself that quantity; when in truth and fact, the said quantity of spirituous liquor so sold and warranted as aforesaid, at the time of sale and warranty thereof, was not, nor did contain in itself, the said quantity of two gallons, but a much less quantity, to wit, six quarts, and no more, as the said D then well knew, to wit, at &c. 8 *Went*. 366.

Deceit in the sale of wool deceitfully packed and not merchantable, &c.

For that the plaintiff, on &c., at &c. bargained with the said D to buy of him &c. wool, which was then and there packed and bound up into &c., parcels, in the form and had the appearance of fleece wool. And the said D, by then and there warranting the said wool, and every parcel thereof, to be fleece wool, and to be packed and bound up fairly and without deceit, and to be good and merchantable, then and there deceitfully sold the same to the plaintiff for the sum of \$—, to be thereafterwards paid by the plaintiff for the same. And the plaintiff avers, that, at the time and place of said sale, the said wool was deceitfully packed and bound up, and that &c. parcels thereof were not fleece wool, nor good nor merchantable wool; but that the inside of said parcels were wool of a much less value, and not good nor merchantable wool; of all which the said D was then and there well knowing. And so the said D falsely deceived and defrauded the plaintiff, &c. 8 *Went.* 369.

Deceit in the sale of pine logs.

For that the plaintiff, on &c., at &c., bargained with the said D to buy of him — pine logs, then lying at &c., as and for pine logs, sound and fit to make clear and merchantable boards, for the sum of \$—. And the said D, then and there sold the same to the plaintiff, as and for pine logs, sound and fit to make clear and merchantable boards, for the said sum of \$—, then and there paid by the plaintiff to the said D; which said pine logs were there at the time of said sale, unsound, rotten, and unfit to make clear and merchantable boards, which the said D then and there well knew. And so the said D deceitfully injured and defrauded the plaintiff &c.

N. DANE.

Deceit in the sale of soap, being unmerchantable.

FIRST COUNT. For that whereas the said D and E, at &c., on &c., bargained with the said plaintiffs for — pounds weight of soap, at — per pound, the said D and E well knowing the said soap to be insufficiently and deceitfully made, and unmerchantable, by warranting the said soap to be sufficiently and well made, good and merchantable, for and in consideration of \$— paid them by the plaintiff, then and there deceitfully and fraudulently sold and delivered him the said soap, insufficiently and deceitfully made and unmerchantable, and the said plaintiff, ignorant of the premises,

and deceived by the said D and E as aforesaid, thereafterwards on the same day, shipped and exported, with great expense and risk, the said soap to Bourdeaux in France, and thereafterwards, *viz.* at S aforesaid, on &c., the said plaintiff wholly lost the sale of the said soap, by reason that the same was found bad and unmerchantable; and thereby is injured and has suffered damage the amount paid for said soap, with his expenses aforesaid, amounting to \$—, and great profits amounting to \$—, then and there accruing, and to be had upon the like quantity of merchantable soap.

SECOND COUNT. And whereas the said plaintiff, at &c., on &c., had bargained with the said D and E, for other — pounds weight of good and merchantable soap, at &c. per pound, amounting to \$—, paid them by the plaintiff; yet the said D and E, maliciously contriving to deceive and defraud the said plaintiff, thereafterwards, on the same day, sold and delivered him other — pounds weight of unmerchantable soap, last aforesaid bargained to the said plaintiff, and the said plaintiff, ignorant of the premises, and wholly deceived therein as aforesaid, thereafterwards, on the same day, shipped and exported, with great expense and hazard, the said last mentioned soap to Bourdeaux in France, and thereafterwards *viz.* at S aforesaid, on &c., the said plaintiff wholly lost the sale of the said soap last mentioned by reason that the same was found bad and unmerchantable, and thereby the said plaintiff has lost and suffered damage to the amount of the said sum paid for the soap last mentioned, with all expenses and risks thereon, amounting to the sum of \$—, and also great profits, amounting to \$—, then and there accruing and to be had upon the like quantity of good and merchantable soap. *Green v. Bishop, S. J. C. 1796.*

S. SEWALL.

Deceit in the sale of soap, candles, &c. being unmerchantable.

For that the said D, at &c., on &c., was possessed of a quantity of soap, usually called white soap, and of a quantity of soap, usually called brown soap, and also of a quantity of dipped candles of tallow, all which said soap and candles, were bad and unmerchantable, and insufficiently made and of unsuitable materials respectively, and being so possessed of the same did then and there, in order to induce the said plaintiff to purchase the same, and knowing the same then and there to be bad and unmerchantable, and made of insufficient materials, and insufficiently made, falsely affirm

and warrant the said soap and candles, to be good and merchantable, and made of suitable materials, and sufficiently made, whereby the plaintiff was induced to buy of the said D, — pounds weight of the said brown soap, at the rate of &c. per pound, and — pounds weight of said white soap, at &c. per pound, and — pounds weight of said dipped candles of tallow, and, in consideration of the sum of \$—, paid the said D by the said plaintiff, being at the rate aforesaid, the said D did then and there sell and deliver unto the said plaintiff, the aforesaid — weight of brown soap, and the aforesaid — weight of white soap, and the aforesaid — weight of candles of tallow, as and for good and merchantable, made of suitable materials, and sufficiently made, and did then and there warrant them to be so. Now the plaintiff in fact says, that the said soap and the said candles, were, at the time of said sale and delivery, bad and unmerchantable, made of unsuitable materials, and insufficiently made, of all which the said D was then and there well knowing. And the said plaintiff, ignorant of the premises, and being deceived by the said D, as aforesaid, thereafterwards, *viz.*, on the same day, shipped and exported the said soap and the said candles, with great expense and risk, to Nantes in France, where, afterwards, *viz.* at said S, on &c. aforesaid, the said soap, being bad and unmerchantable, and insufficiently made, and of unsuitable materials, the greater part thereof was lost to the said plaintiff, together with his expenses aforesaid, amounting to \$—; and he was thereby deprived of great profit and gain in the said soap and candles, amounting to a great sum, *viz.* the sum of \$—, then and there accruing on good and merchantable soap.

For deceit in the sale of soap.

FIRST COUNT. For that whereas the said D, at &c., on &c., in consideration of &c., to him paid by the said plaintiffs, undertook and promised to deliver them — pounds weight of best soap, and — pounds weight of soap of the second quality, with boxes for the same, and to be good and merchantable soap; but the said D, thereafterwards, on the same day, disregarding his undertaking aforesaid, and contriving to deceive the said plaintiffs, delivered them — pounds weight of soap, insufficiently and deceitfully made of bad and unsuitable materials, and of which the said D was well knowing.

SECOND COUNT. And for that whereas the said plaintiffs, thereafterwards, *viz.* on the same day, bargained with the said D for a quantity of soap, to be of the best and second quality; and the said D, then and there sold to the plaintiffs other — pounds weight of soap, by warranting part thereof, *viz.* — pounds weight, to be of the best quality, and — pounds weight to be of the second quality; but the said D, then and there, upon the bargain aforesaid, contriving to deceive and defraud the plaintiffs, delivered to the plaintiffs other — pounds weight of soap, insufficiently and deceitfully made, and of bad and unsuitable materials; of which the said D was well knowing, and received therefor, and for the boxes containing the same, the sum of \$— in payment for the same, sold as for good and merchantable soap. And the plaintiffs aver, that, being ignorant of the fraud and deceit of the said D in the premises, they thereafterwards, *viz.* on &c. shipped and exported the said two quantities of soap, delivered by the said D as aforesaid, for sale beyond the seas, *viz.* to Nantes in France; but the said soap being bad, unmerchantable, and insufficiently and deceitfully made, the plaintiffs there, to wit, at S aforesaid, on &c., suffered great loss on the said soap, *viz.* &c. expense thereon, and &c. profit arising on merchantable soap; to the damage, &c. *S. J. C. 1797.* **S. SEWALL.**

NOTE. At the first examination of the two preceding counts, there is apparently a misjoinder of Assumpsit with Case. The second count is obviously in Case, but the first does not at first view, seem to belong to that form of action. It begins in Assumpsit and alleges a promise, and then proceeds as if setting out a breach. However, it concludes in Case, for if considered in Assumpsit, the breach is not logically assigned. The plaintiff declares, that the defendant promised to deliver him *good* soap; he concludes that the defendant disregarding his promise, delivered him *bad* soap. This is no breach, because it does not appear but that he delivered good soap and bad soap too. The breach should be assigned, *that he did not deliver good soap, &c.* This count, therefore, if good at all, must be considered in Case, and then there is no misjoinder, and of this opinion probably were the counsel, Parsons and Prescott, for they pleaded "not guilty" to both counts. *Quære of the special damages in the second count.*

1st COUNT. *For deceit in the sale of pigs fattened on unwholesome food.*

For that whereas the said plaintiff at &c., on &c., had bargained with the said D and E, to buy of them fourteen live pigs, for a large sum of money, to wit, the sum of \$—, being then and there a good and sound price, and valuable consideration for good and sound pigs, which had been fed

with proper food, and suitable to be killed, for good and merchantable pork, to wit, at &c. aforesaid, on the day and year aforesaid; and the said D and E, then and there, well knowing the said pigs to have been fed upon flax-seed cakes, so called, and that the flesh of the same was thereby rendered stinking and offensive, and unfit for use, then and there falsely, fraudulently and deceitfully offered for sale, and did in fact fraudulently, falsely, and deceitfully, sell and deliver the said pigs to the said plaintiff, who was wholly ignorant of the premises, as and for good pigs, fit for use, and as having been fed with proper food, and suitable to be killed for good and merchantable pork; and the plaintiff in fact saith, that he, afterwards, *viz.* on &c., killed the same pigs, and, at great trouble and expense, salted and shipped the same, on board the &c., whereof one A B was master, for &c.; and the plaintiff further avers, that the flesh of said pigs, by reason of their having been fed as aforesaid, of which he was wholly ignorant, and whereof the said D and E were well knowing as aforesaid, was rendered stinking and unfit for use, and so damaged and offensive, that the plaintiff sustained great loss and detriment, in and about the sale thereof, to wit, &c., at &c. aforesaid, *viz.* at &c. (*the venue*;) and so the said plaintiff saith, that the said D and E, on &c., at &c. aforesaid, falsely, fraudulently, and deceitfully deceived him the said plaintiff.

Stated more generally.

SECOND COUNT. For that whereas the said plaintiff, thereafterwards, to wit, on &c., bargained with the said R and E to buy of them fourteen other pigs, to be killed for good fresh pork, for a large sum of money, *viz.* the sum of \$—; and the said R and E, then and there well knowing the same pigs to be damaged, and unfit to be killed for fresh pork, then and there falsely, fraudulently, and deceitfully offered for sale, and then and there so falsely, fraudulently, and deceitfully did sell and deliver the same other pigs to said plaintiff, as and for good pigs, fit to be killed for good fresh pork; and the said plaintiff, being wholly deceived respecting the premises, then and there paid the said R and E, the sum of \$—, being a sound price, and valuable consideration for good pigs, fit to be killed for good fresh pork; and the said plaintiff in fact saith, that he, thereafterwards, *viz.* on &c., killed said other pigs, and that the flesh thereof was bad, and unfit for fresh pork; and the said plaintiff further

avers, that, in order to make the best of the same, he there-
afterwards, *viz.* on &c., at great expense and trouble, salt-
ed, and shipped, and sent the same on board the &c., to
&c., that the same, when opened for sale there, was found
to be damaged, and not merchantable, and that thereby he
there met and sustained great loss, and trouble, *viz.* the sum
of &c., in selling and disposing of the same at &c., to wit,
at &c. aforesaid, and so the said plaintiff says, that the
said R and E, falsely, fraudulently, and deceitfully deceived
the said plaintiff.

The same as the first count, stated more concisely.

THIRD COUNT. And also for that whereas the said plain-
tiffs, thereafterwards, *viz.* on &c., had bargained with the
said D and E, to buy of them fourteen live pigs, other than
those abovementioned; and the said D and E, then and
there, well knowing the same other pigs last mentioned, to
have been fed upon flax-seed cakes, so called, and to have
been thereby damaged and rendered unfit to kill for pork,
then and there, by warranting the same other pigs last men-
tioned, to be good and fit to be killed for pork, falsely, de-
ceitfully, and fraudulently sold the same other pigs last men-
tioned to the said plaintiff, for a great sum of money, *viz.*
for the sum of \$—, which was a good sound price, and val-
uable consideration for the same, whereas in truth and fact,
the same other pigs, last mentioned, were damaged, and
were unfit to be killed for pork, and the flesh of the same,
when killed, was offensive and stinking; and so the said
plaintiff saith that the said D and E falsely and fraudulent-
ly deceived him, the said plaintiff; all which is to the dam-
age, &c. *Whittemore v. Pike.* S. PUTNAM.

NOTE. An action on the case for a deceit, in a bargain, is maintain-
able only, where the deception complained of, has been intentional on the
part of the seller, and the purchaser was actually deceived, and has sus-
tained a damage in consequence of it. *See the case of Emerson, &c. v.*
Brigham, &c., 10 Mass. R. 197. Sewall, Justice, in that case, recognizes
the rule laid down by Popham, Justice, there cited, to be good law. "If
I have an article, which is defective, whether victuals, or any thing else,
and I, *knowing it to be defective*, sell it as sound, and so represent it or
affirm it, an action upon the case lies for the deceit. But, although it be
defective, if that be unknown to me, although I represent or affirm it to
be sound, yet no action lies, unless I warrant it to be sound."

Under the Revised Statutes of Massachusetts, the penalty for selling
diseased, corrupted, or unwholesome provisions, whether meat or drink,
without making the same fully known to the buyer, is imprisonment in
the county jail, not more than six months, or a fine not exceeding two
hundred dollars, &c., &c.

For falsely affirming a note to be made by R, of B, and assigning it as such, when in fact it was made by R, of A, an insolvent.

For that the said E, on &c., at &c., being possessed of a promissory note, whereby one R, of A, promised to pay to the said E, or order, \$—, on demand, with lawful interest for the same, until paid; and the said E, knowing that the said R had absconded, and that neither he nor his estate, could be come at to be attached, nor the said \$—, nor the interest thereof, could be recovered; and intending and fraudulently contriving to defraud and deceive the plaintiff, thereafterwards, on the same day, falsely affirmed and declared to the plaintiff, that the said promissory note was made and given by one R, of B. And the plaintiff, giving credit to the said declaration of said E, and knowing the said R, of B, to be a person of substance, and well able to pay the said \$— and the interest thereof, then and there bought the said promissory note of the said E, and paid him in neat cattle the value of the said \$—, and the interest thereof then due. And the said E then and there sold the said note to the plaintiff, for the price aforesaid, as a note made and given by the said R, of B, the said E, at the same time, well knowing that the same note was not made and given by the said R, of B, and that it was worth nothing; and thereby deceived the plaintiff, and defrauded him of \$—, &c.

TROWBRIDGE.

Deceit for affirming T to be a man of good substance, and thereby inducing plaintiff to sell him a yoke of oxen on credit.

For that the said R, on &c. in order greatly to deceive the plaintiff, came, together with one T, to the plaintiff's house, in S aforesaid; and then and there, well knowing that the plaintiff had a yoke of oxen for sale, declared to the plaintiff that the said T was a person of good substance, and a brazier in Boston, in the county of S, and of considerable trade and business, and was obliged to ship off a considerable quantity of beef, and assured the plaintiff he might safely trust said T. And accordingly, the plaintiff, crediting the words and speeches of the said R, was then and there prevailed upon to sell a pair of oxen to the said T, for the sum of \$80, and to take the said T's note for the payment thereof, on &c., then next ensuing; whereas the said R well knew, at the time of sale of said oxen, and the taking of said note, that the said T was not the person by him represented as aforesaid, and no brazier in said Boston,

nor in such trade and business, nor in such credit as aforesaid; but was an imposter, equipped by the said R to impose on people, and to deceitfully gain the property of others upon credit; by all which false and deceitful actions and sayings of the said R, the plaintiff was not only deceived in the sale of his oxen as aforesaid, but put to \$60 charges and costs, in regaining his said oxen. R. AUCHMUTY.

Deceit for falsely affirming G to be a man of interest, &c., and thereby inducing plaintiff to trust him.

For that whereas, on &c., at &c., a certain discourse was moved and had between the plaintiff and one G, and the said D, of and concerning the plaintiff's selling to the said G, certain goods and wares, of which the plaintiff was then possessed, of the value of \$—, and of and concerning the said G's purchasing the same upon credit, and giving his promissory note for the same, payable with interest, in one month; and the plaintiff, not knowing the circumstances of said G, and whether he was of ability to pay the same sum, declined and refused to trust the said G, with the said goods and wares, or to take his promissory note therefor, unless he could be well assured of said G's ability to pay the same sum. And the said D, then and there, well knowing that the said G was not of sufficient ability to pay the said sum, and was not worth one cent in the world, and well knowing that the said G intended never to pay the same sum, but to cheat the plaintiff thereof, then and there, falsely and fraudulently affirmed to the plaintiff, that the said G was a person of interest, and of sufficient ability to pay the said sum, and that the plaintiff need not be afraid to give him credit, or to take his promissory note, payable in one month therefor. And the plaintiff avers that he, believing and trusting in the said false information of the said D, did then and there credit the said G for divers goods and wares, to the value of \$—, and then and there took his promissory note to that date, for the payment of the same sum, in one month from the date of said note, and interest for the same till paid; and the plaintiff further avers, that the said G was not then worth one cent, which the said D well knew; and the plaintiff has never been able to find the said G since, who has absconded, although he has spent much money in seeking to find him; and so has totally lost the said sum and interest; to the damage, &c. *Varnum v. Danforth.* J. LOWELL.

Another.

For that, on, &c., at, &c., the said D, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade the plaintiffs to sell and deliver one A B divers goods and merchandises, to wit, sixteen bags of cochineal, of great value, to wit, of the value of \$—, upon trust and credit; and did, for that purpose, then and there, falsely, deceitfully and fraudulently assert and affirm to the plaintiffs, that the said A B then and there was a person safely to be trusted, and given credit to in that respect, and did thereby falsely, fraudulently and deceitfully, cause and procure the plaintiffs to sell and deliver the said goods and merchandises upon trust and credit to the said A B, and in fact, the plaintiffs, confiding and giving credit to the said assertion and affirmation of said D, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on &c., at &c., sell and deliver the said goods and merchandises, upon trust and credit to the said A B, whereas, in fact, at the time of the said D's making his said assertion and affirmation, the said A B was not then and there a person safely to be trusted and giving credit to in that respect, and the said D well knew the same, to wit, at &c.; and the plaintiffs further say, that the said A B hath not, nor hath any other person, on his behalf, paid to the plaintiffs or either of them, the said sum of \$—, or any part thereof, for said goods and merchandises; but, on the contrary, the said D is wholly unable to pay the same, or any part thereof to the plaintiffs, to wit, at &c.,* and so the said D deceived the plaintiffs; and thereby they have been imposed on and wholly lost the said goods and merchandises and the value thereof, &c. *Paisley v. Freeman*, 3 T. R. 51.

NOTE. In this case, the principle upon which the above and the two preceding declarations are framed, is recognized; and it was established, that a false affirmation, made by the defendant to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action on the case, in nature of deceit; and this, though the defendant is not benefited by the deceit, nor has colluded with the person who is benefited by it. (MSS.)

Deceit in the exchange of oxen.

For that the said T, on &c., at &c., being possessed of a pair of oxen, one of which was unsound, and infected with a bad and inveterate sore in his left shoulder, which render-

* The conclusion in the original is very long and verbose.

ed the said ox good for nothing; and the plaintiff being then and there also possessed of another pair of oxen, of his own proper oxen, of the value of &c., he, the said T, to induce the plaintiff to exchange oxen with him, did then and there falsely and fraudulently affirm to the plaintiff, that his, the said T's, oxen, so far as he knew, were then well, good, and sound oxen; whereupon the plaintiff, giving full credit to the said T's said affirmation, was instantly induced to, and did then and there deliver his said oxen to the said T, in exchange for the said T's oxen aforesaid. And the said T did then and there deliver his said oxen to the plaintiff, in exchange for the plaintiff's said oxen, and did also then and there pay the plaintiff the sum of &c., as boot between the said oxen. Now the plaintiff in fact says, that the said T's oxen aforesaid, were not at the time of the delivery, exchange, and affirmation aforesaid, well, sound, or good; but that one of them was then and there infected with, and labored under a bad and inveterate sore, in and upon his left shoulder, which made him utterly unfit for any service, and good for nothing; of all which the said T was then and there well knowing. And so the said T, by means of his said false affirmation, hath greatly injured and defrauded the plaintiff, &c.

F. DANA.

For falsely warranting horse to be sound.

For that whereas the plaintiff, on &c., at &c., bargained with the said T, to buy of the said T, a certain gelding of the said T. And the said T, well knowing the same gelding to be infirm, unsound, and infected with a certain distemper, called the glanders, by then and there warranting the said gelding to be sound and free from any distemper whatever, then and there deceitfully sold the said gelding to the plaintiff for the sum of \$—; which said gelding, at the time of the sale thereof, was, and from that time to the time of the death of said gelding, continued infirm, unsound, and infected with said distemper, to wit, at &c. And so the said T falsely and fraudulently deceived the plaintiff, &c.

2 *Went.* 127.

WARREN.

See ante, under the head of ASSUMPSIT, various declarations in the nature of DECEIT.

In relation to warranty on the sale of horses. See Law Summary, (2d edition,) p. 107.

Deceit for selling plaintiff a cow not belonging to defendant.

For that the plaintiff, on &c., at &c., bargained with the

said T, to buy of the said T, a certain cow, who knowing the same to be the cow of one A, then and there sold it to the plaintiff, warranting the same cow as his, the said T's, own cow, for a great sum of money to be paid therefor by the plaintiff to the said T. And afterwards, on &c., at &c., the said A took and carried away the said cow, as his own cow, from the plaintiff. And to the said T hath deceived and defrauded the plaintiff &c. See *Bohun*, 241.

Deceit in exchanging a horse not belonging to defendant.

For that the said R, on &c. at &c., being possessed of a red roan gelding, affirmed and declared to the plaintiff, that the said gelding was the proper gelding of him, the said R, and thereby induced the plaintiff to buy the same gelding of the said R, and give him therefor another horse, and the sum of \$—. And the said R, then and there being possessed of the same red roan gelding, sold him to the plaintiff for the said other horse, and the said sum of \$—. And the said R in fact says, that the said roan gelding never was the proper gelding of the said R; but, at the time and place of affirmation and sale aforesaid, was the proper gelding of one A, and of right to him did belong; and that the said A, afterwards, on &c., at &c., took and led away the said roan gelding, being of the value of \$—, from and out of the hands and possession of the plaintiff, as the proper gelding of him, the said A; to the damage, &c. TROWBRIDGE.

Against a married man for getting plaintiff with child, under pretence of courtship.

For that whereas the plaintiff hath always been of good fame and reputation among her neighbors, and lived in favor and esteem with them from her childhood, and on &c., at &c., was a widow, and from that time to this hath continued sole and unmarried. And the said T, then and there, contriving maliciously to injure the plaintiff and pretending himself to be sole, and a bachelor, requested the plaintiff to marry him, making many protestations of his affection and desire to marry her; and under pretence of marriage, did deceive the plaintiff, and get her with child; whereas, the plaintiff says, that the said T then was, and to this time hath been married, to wit, at &c., whereof the plaintiff was then and there ignorant; by means whereof, the said T hath grievously injured the plaintiff and hurt her peace of mind, &c. W. WETMORE.

NOTE. In the case of *Paul v. Frasier*, it was held, that no action lies for seducing a woman and getting her with child, unless a promise of marriage is alleged. 3 Mass. R. 297.

But, as evidence of an *express* promise is not required in such actions, and a promise may be inferred from the behavior of the parties to each other, it will be best, in all cases of seduction under pretence of courtship, to declare on the promise inferred by the law. See the eloquent opinion of the late C. J. Parker, in *Wightman v. Coates*, 15 Mass. R. 1.

Against an indented servant for deceit in selling a share of prize money.

For that the said T, at &c., on &c., then being a sailor registered on board the ship, called &c., and a discourse arising between the plaintiff and the said T, relative to the purchase of a part of the share of a common sailor in said ship, in any prizes to be taken by her, in her then next intended cruise against &c., he, the said T, then and there offered to the said plaintiff, to assign and sell him one quarter part of such share, in consideration of the sum of &c., to be paid by the plaintiff to the said T. And the said T, that he might induce the plaintiff to purchase such quarter part aforesaid, then and there confidently affirmed and declared to the plaintiff, that he, the said T, was at that time a sailor registered on board said ship; and he further then and there, falsely and fraudulently affirmed and declared, that he had good right and authority to sell the same or any part thereof, and thereby induced the plaintiff to purchase a quarter part of such share; and the plaintiff, giving credit to the said affirmation of the said T, then and there paid the said T, as a consideration for the same the full sum of \$ — aforesaid; and the said T, then and there pretendedly assigned and conveyed to the plaintiff the whole of one such quarter part, as aforesaid. Now the plaintiff in fact says, that the said T was, at that time, and still is, the indented servant of one B B, and that the said T had no right in any share of a common sailor, as aforesaid, nor in any part thereof; and that the labor and services of the said T, as a sailor as aforesaid, were for the proper use and benefit of the said B B; and that the said T had no right or authority to sell such share, or any part thereof; and that the said B B afterwards claimed and received the whole benefit of the whole share aforesaid; and so the said T deceived the plaintiff, and defrauded him of the said sum of \$ —, which the plaintiff paid to the said T as aforesaid; to the damage, &c.

5. *Declarations in Case against officers.*

Against sheriff for default of deputy in the service and return of an execution.

For that the said plaintiff, by the consideration of our justices of our S. J. Court, recovered judgment against A, of &c., for the sum of &c. damage and costs of suit taxed at &c., as appears of record in our said S. J. Court. And afterwards, *viz.* on &c., at &c., the said plaintiff for recovery of the sum of &c., part of said damages, and for recovery of the costs aforesaid, then remaining due and unsatisfied, purchased our writ of execution, in form by law prescribed, out of the clerk's office, of our said S. J. Court, directed to the sheriff of our said county of &c., or his deputy, commanding them that of the goods, chattels, or lands of the said A, within his precinct, he should cause to be paid and satisfied unto the said plaintiff, at the value thereof in money, the aforesaid sums due, being &c., with &c. more for that writ; and thereof to satisfy himself for his own fees, and for want of goods, chattels or lands of the said A, to be by him shown unto him, or found within his precinct, to the acceptance of the said plaintiff, to satisfy the sums due as aforesaid, to take the body of the said A, and him commit unto either of our jails, in &c., and detain in his custody, within our said jails, until he should pay the full sums due as abovementioned, with his fees, or that he should be discharged by the said plaintiff, the creditor, or otherwise by order of law, and thereof not to fail, and to make return of that writ, with his doings therein, into our said S. J. Court &c. And afterwards, *viz.* on &c. at &c., our said writ of execution was delivered to the said T, then, ever since, and now a deputy-sheriff, within and for our said county of &c., to be served, executed, and returned, according to the precept thereof; and the said plaintiff avers, that the said T, then and there had goods and chattels, *viz.* &c. of the said A in his hands, more than sufficient to pay and satisfy the sums aforesaid, due as aforesaid, whereout he then and there well might, and by law ought to have paid and satisfied the same to the said plaintiff, by virtue of that writ, and the said T was then and there requested by the said plaintiff, to pay and satisfy him the same thereout accordingly; yet the said T, regardless of his duty in the premises, and minding to defraud the said plaintiff of the sums aforesaid, due to him as aforesaid, and to deprive him of the benefit of his judg-

ment and writ of execution aforesaid, then and there refused, and ever since hath refused to pay and satisfy to the said plaintiff said sums, out of said goods, chattels, gold, silver, and moneys, by virtue of said execution, but afterwards, viz. on &c., returned our said writ of execution, into our said S. J. Court, then sitting at &c., within and for our said county of &c., and thereon falsely and deceitfully returned and certified, that he had made diligent search, and could not find goods, lands, chattels, or body of the said A, and so returned that execution, in no part satisfied, by means whereof the said plaintiff, hath wholly lost the benefit of his judgment and execution aforesaid, and his remedy for recovery of the sums aforesaid, and the same remain still due and unpaid; to the damage &c. *Treadwell v. Wait, Essex, 1785.* T. BRADBURY.

NOTE. As the return of a sheriff is of such high regard, that no averment in pleading is allowed against it, a party injured by a false return would be remediless, if he had no remedy by action. For this reason, an action on the case may always be maintained by a party aggrieved by such false return. 15 East's R. 378. See *Williams v. Carey*, 4 Mod. R. 404. This action lies at common law, and may be maintained, though the return is true in words, if false in substance. Doug. R. 159.

It is said, that an action on the Case will not lie against a sheriff, for an insufficient return. But this can be only where the return can be amended. See Cro. Eliz. 512.

In England, a deputy-sheriff is liable to an action on the Case, for *misfeasance*, but not for *non-feasance* or neglect of duty. Here, he is liable for either *misfeasance* or *non-feasance*. But Case may be brought against the sheriff for the *neglect* of his duty, as well as for *misfeasance*.

For the direct tortious act of the deputy, Trespass lies against either, at the option of the party injured. Case will not lie.

So if a deputy-sheriff takes insufficient bail, Case lies against the sheriff or deputy, and even before any proceedings had against the bail; it is his duty to see to the sufficiency of the bail. See *Young v. Hosmer*, 11 Mass. R. 89; *Rayner v. Ball*, 15 Mass. R. 377.

In such action the original judgment against the debtor is *prima facie* evidence of the plaintiff's debt, subject to be impeached on the ground of collusion.

The sheriff, in mitigation of damages, is at liberty to show, that the debtor had no property; but this is not to be presumed. See *ibid*.

Under the Revised Statutes of Massachusetts, ch. 91, sec. 2, an officer may require two sureties, each having sufficient within the county; if he takes a bail bond with one only, though sufficient at the time, yet he shall be answerable for any loss sustained by the plaintiff from the bail's insufficiency.

Under the Revised Statutes of Massachusetts, ch. 97, sec. 73, if an officer unreasonably neglects to pay over money which he has collected, on demand by the creditor, he shall forfeit to him, five times the lawful interest. See the case *Esty v. Chandler*, 7 Mass. R. 466, where a construction is given to a similar provision in Mass. Act of 1783. The ac-

tion was Case against the sheriff for the act of his deputy, and the 30 per cent. interest was recovered from the time of the demand on the deputy.

Against sheriff for neglect of deputy in suffering a voluntary escape.

For that whereas the plaintiff, by the consideration of our justices of &c., holden at &c., on &c., within and for our county of &c., recovered judgment against one C, of &c., for the sum of \$—, damage, and \$—, costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, on &c., the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of &c., or his deputy, commanding them, among other things, that of the goods, chattels, or lands of the said C, within their precinct, to cause to be paid and satisfied unto the plaintiff at the value thereof in money, the aforesaid sums, with &c. more for our said writ of execution; and for want of goods, chattels, or lands of the said C, to be by him shown unto them, the said sheriff or deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C, and him to commit unto our jail, in &c., in our said county of &c., and to detain him in our said jail, until he should pay the full sums abovementioned, with the said sheriff's or deputy's fees, or that he should be discharged by the plaintiff, the creditor, or otherwise, by order of law. And afterwards, on &c., at &c., the plaintiff delivered the said writ of execution to one A, then and ever since one of the deputies of the said D, in and for our county of &c., to be duly executed by him, the said A. And thereafterwards, on &c., by vi. tue of our said writ of execution, and for want of goods, chattels, or lands of the said C, by him shown, or to be found as aforesaid, the said A took the body of the said C, and him had and detained in his custody, for the space of one hour; and then the said A, in no wise regarding the duty of his said office, freely and voluntarily suffered him, the said C, to escape out of his custody, and go at large whither the said C would, without the license and against the will of the plaintiff, the damage, costs, and charges aforesaid, being then unpaid and unsatisfied to the plaintiff; whereby an action hath by law accrued to the plaintiff, to demand and to have the aforesaid sums, amounting in the whole to \$—, of the said D, who by law is answerable for the laches and misdoings of the said A, in the execution of his said office of deputy-sheriff; yet the said D, &c. *Hall et al. v. Phipps.* J. SEWALL.

NOTE. Under the Revised Statutes of Massachusetts, the action of Debt is abolished for an escape, whether negligent or voluntary. ch. 97, sec. 71.

By sec. 72, the plaintiff in such case, may have an action against the officer to recover such damages as he shall have suffered by the escape.

Against jailer for suffering an escape of debtor on execution.

For that whereas the plaintiff, by the consideration of our justices of &c., holden at &c., on &c., within and for our county of &c., recovered judgment against one C, of &c., for the sum of \$—, damage, and \$—, costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, on &c, the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of &c., or his deputy, commanding them among other things, that of the goods, chattels or lands of the said C, within their precinct, to cause to be paid and satisfied unto the plaintiff at the value thereof in money, the aforesaid sums, with \$— more for our said writ of execution; and for want of goods, chattels, or lands of the said C, to be by him shown unto them, the said sheriff or deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C, and him to commit unto our jail, in &c., in our said county of &c., and to detain him in our said jail, until he should pay the full sums abovementioned, with the said sheriff's or deputy's fees, or that he should be discharged by the plaintiff, the creditor, or otherwise by order of law. And afterwards, on &c., at &c., the plaintiff delivered the said writ of execution to one A, then and ever since one of the deputies of the said D, in and for our county of &c., to be duly executed by him, the said A. And thereafterwards, on &c., by virtue of said writ of execution, and for want of goods, chattels or lands of the said C, by him shown, or to be found as aforesaid, the said A took the body of the said C, and committed him to our said jail, in &c. aforesaid, to the custody of the said D, then and ever since keeper of our jail, to be by him there detained, till the said C should pay the full sums abovementioned, or be otherwise discharged as aforesaid; yet the said D, the duty of his office of keeper of the said jail as aforesaid, not regarding, did not detain the said C in our said jail; but by his negligence, suffered the said C to escape from our said jail, and go at large where he would, without the consent and against the will of the plaintiff, he being then and still

unsatisfied of his damage and costs aforesaid, whereby an action hath by law arisen to the plaintiff, to demand and have the aforesaid sums, amounting in the whole to \$—, of the said D ; yet, though requested, he hath not paid the same, but refuses and neglects so to do.

Against deputy, for serving writ in which he was a party defendant, &c.

For that, on &c., at &c., one J M, for value received of the plaintiff, indorsed over to him a promissory note, under the hands of S B and the said N, bearing date the — day of &c., by them given to the said J M, or his order, in — months from the date thereof, with lawful interest for it afterwards, if not then paid ; and by the same indorsement, appointed the contents of said note, then unpaid, to be paid to the plaintiff, who afterwards, viz. on &c., at &c., the said — months being expired, gave the said S B and the said N due notice thereof, and then and there requested them to pay him the contents of said note, which they neglected to do ; wherefore the plaintiff, afterwards, viz. on &c. took out of the clerk's office of our [Court of C. P.] for said county, our writ of capias or attachment, in the form by law prescribed, against the said S B and the said N, who then was, and ever since hath been, a deputy-sheriff of our said county of &c., returnable into our said court, held at &c., within and for our said county of &c., on &c., directed to any coroner of our said county of &c., or his deputy, and no otherwise directed, commanding such coroner or deputy to attach the goods or estate of the said S B and the said N, to the value of &c., and for want thereof to take their bodies if to be found in his precinct, and them safely keep, so as to have them before our justices of our said court, then next to be held at &c., within and for our said county of &c., on &c., to answer to the now plaintiff, in a plea of the case, for not paying him the said sum of &c., with the interest aforesaid. And the said N, afterwards, viz. on &c., perceiving that our said writ was taken out as aforesaid, and subtilely contriving to defeat the plaintiff's suit aforesaid, and to defraud the plaintiff of the aforesaid \$—, and of the aforesaid interest for it, and to expose him not only to the costs of his suit aforesaid, but also to the payment of costs to the said S B and N, at &c., craftily got into his hands, our writ aforesaid ; and afterwards, viz. on &c., in our said county, served the same writ on the said S B and N, by attaching a dwellinghouse and —

acres of land of the said S B, and by attaching a cow of the said N, and giving each of them a summons; and wrote his said service and doings thereon, and subscribed the same by the name of "J. N, Deputy-Sheriff;" and afterwards returned the said writ, so served, into our said court, when and where it was returnable as aforesaid. And the plaintiff, supposing the same writ to be duly served by a coroner of our said county, or his deputy, entered his said action in our said court, held as aforesaid. And the said S B appeared in our said court, to answer to the plaintiff in his said action, and finding said writ was not served by such coroner as aforesaid, or his deputy, but was served by the said N, without being directed to a deputy-sheriff of our said county of &c., alleged and showed the same to our said court, and prayed that the same writ might be dismissed, for want of a good legal service, and for their costs to be allowed them; whereupon our said court then and there gave judgment accordingly, and allowed the said S B \$— for his costs. And the said S B hath since sued out our writ of execution upon the said judgment, and the plaintiff hath thereupon been compelled to pay that sum with &c. more for the same writ, and hath also, by reason of the aforesaid fraudulent management and intermeddling of the said N, lost his own costs and expenses in that suit, besides much time in commencing and so far prosecuting his said action, and hath also been ever since delayed in recovering the debt aforesaid.

R. DANA.

Against sheriff for neglect of his deputy in service and return of a writ of execution.

1st COUNT. — *For not levying the execution.*

For that whereas the plaintiffs, by the consideration of our justices &c., recovered judgment by the names and additions of J A and S A, both of &c., in the county of &c., tanners, against R, of &c. in the county of &c., trader, for the sum of \$— damages, and \$— costs of suit, by him in that behalf expended; and the said plaintiffs, at &c, on &c., purchased out of the clerk's office of our said court, our writ of execution upon the same judgment, directed to the sheriff of our said county of &c., or his deputy, wherein we commanded them severally, that of the goods, chattels, or lands of the said R, within their precinct, they should cause to be paid and satisfied to the said plaintiffs the sums of &c., and &c. more for our said writ of execution on the same judgment; and

the said sheriff and his deputy, in and by the said writ, were severally commanded that they should, for want of goods, chattels, or land of the said A, to be by him shown unto them or found within their precinct, to the acceptance of the said plaintiffs to satisfy the sums aforesaid, take the body of the said A, and him commit unto either of the jails in our said county of &c., to be there detained in their custody, until he paid said sums, with their fees, or should be otherwise discharged; and the said sheriff and his deputy, were therein further severally commanded to make return of the same writ of execution with their doings therein into the clerk's office of our said court of &c., within three months next following the date of the same writ; and the plaintiffs aver, that the said R, on &c., was, and long before was, and ever since has been, sheriff of our said county of &c., and in his said capacity was liable for all the malfeazance and misfeazance of his deputies; and the said plaintiffs, at &c., on &c., delivered the same writ of execution to T, of said etc., who then was, and ever since has been, a deputy sheriff of the said R, duly and legally qualified, and for whose conduct in the said office of deputy-sheriff, the said R was answerable for him, the said T, to serve, execute and return the same, according to our command therein given; now the plaintiffs aver, that the said R, neglecting his duty in his said office of deputy-sheriff, as aforesaid, totally neglected to serve, execute, and return the same writ of execution, according to our command therein given (except that he did serve the same for and receive thereon the sums of &c. and &c.) by means whereof the said plaintiffs have totally lost the benefit of their said judgment for the sums for which the said execution issued, (excepting the two sums last abovesaid,) in having lost their right to obtain an alias writ of execution to satisfy their said judgment.

For false return of execution, as satisfied only in part, &c. after receipt of the whole debt and costs.

SECOND COUNT. For that whereas the said plaintiffs, by the names and additions as aforesaid, by the consideration of our justices &c., recovered one other judgment against the said A, of &c., for one other sum of &c., damages, and one other sum of &c., costs of suit, by him in that behalf expended; and the said plaintiffs, at &c., on &c., purchased out of the clerk's office of our said court, his writ of execution, upon his said last mentioned judgment, directed to

the sheriff of our said county of &c., or his deputy, wherein we commanded them severally, that of the goods, chattels or lands of the said A, within their precinct, they should cause to be paid and satisfied to the said plaintiffs, the sums of &c., and &c. more for our said writ of execution on our said judgment last mentioned; and the said sheriff and his deputy were therein commanded, that they should, for want of goods, chattels or lands of him, the said A, to be by him shown unto them or found within their precinct, to the acceptance of the said plaintiffs, to satisfy and pay the sums aforesaid, take the body of the said A, and him commit unto either of the jails in our said county, &c., to be there detained in their custody until he paid said sums, with their fees, or should be otherwise discharged; and the said sheriff and his deputy, were therein severally commanded to make return of the same writ of execution, and the said last mentioned judgment, with their doings thereon, into the clerk's office of our said court of, &c., within three months next following the date of the said writ of execution: and the plaintiffs aver, that the said D, on &c., was, and long before was, and ever since has been, sheriff of our said county of &c., and in his said capacity was liable for all malfeasance and misfeasance of his deputies. And the said plaintiffs, at &c., on &c., delivered our said last mentioned writ of execution to T, of &c., who then was, and ever since has been a deputy-sheriff of said D, duly and legally qualified, and for whose conduct in the said office of deputy-sheriff, the said D was answerable, for him, the said T, to serve and execute and return the same, according to our command therein given: Now the plaintiffs aver, that the said T, neglecting his duty in the said office of deputy-sheriff, did receive full and complete payment of the sums required or satisfied in said execution; yet did not return the same according to the command therein given, but made the following false return, in the words following, *viz.* "I return this execution satisfied for the above sums of &c., in part for debt, and &c. in full for costs of this execution. T, deputy-sheriff." All which is to the damage, &c. *Albree et al. v. Bartlett, S. J. C. 1796. W. PRESCOTT.*

Against sheriff for a false return of execution and neglect of duty in his deputy.

For that whereas the plaintiff, by the consideration of our justices &c., recovered judgment against one J S, of

&c., for the sum of \$—, damages, and \$—, costs of suit, as by the record &c.; and on &c., sued out our writ of execution thereon, in due form of law, directed to the sheriff &c., and returnable &c. And on &c. the said plaintiff delivered our said writ of execution to one E F, who then was, and until after the day when our said writ was returnable, continued to be one of the said D's deputy-sheriffs of our said county of &c., to be by the said E F duly executed and returned, according to our command therein given; yet, neither the said E F, nor the said D, nor any of the said D's deputies, for whose defaults he is answerable, would execute our said writ, nor make any lawful return thereof to our said court, where the same was returnable, according to our command therein given; but the same E F kept the same writ until &c., and then returned it into the clerk's office of our said court, with this false return indorsed thereon; E—, ss. [date] "I return this execution in no part satisfied, by virtue of the creditor's order: E F, deputy-sheriff." Now the plaintiff in fact saith, that he never gave any such order, and that he has not been satisfied for his debt aforesaid, but the same still remains due and unpaid; and by means of the said E F's doings aforesaid, the said plaintiff has lost his debt and costs aforesaid; to the damage, &c.

FESSENDEN.

For neglect in the service of an execution and suffering an escape.

For that whereas one A was indebted to the plaintiff in the sum of \$— for goods &c.; and the plaintiff, in order more speedily to recover his just debt aforesaid, on &c., at &c., purchased a writ of attachment, in due form of law, out of the clerk's office of our court of C P for &c., returnable at our court of C. P., then next to be holden &c., and to the sheriff of said county directed; and then and there delivered the same to the said D, who then was, and still is, sheriff of said county, for him to serve and return the same; by virtue of which the said D was commanded to attach, &c. [*Here recite the writ.*] And afterwards on &c., at &c., in pursuance of the same writ, the said D, sheriff as aforesaid, for want of goods or estate of the said A, took the body of said A, and committed him to our jail in &c. of which jail D then was, and ever since hath been, keeper, and made true return of his said doings, according to his said precept, unto our court of C. P., holden &c., at which same court, to which the same was returnable as aforesaid,

the plaintiff entered his action aforesaid ; and thereupon, by the consideration of our justices of the same court, recovered against the said A the sum of \$—, damages, with costs of suit, taxed at &c., and afterward, on &c., took out of the same office, at &c., our writ of execution on the same judgment, in form by law prescribed, and directed to the sheriff, &c.; and then, at &c., being within thirty days after the judgment aforesaid was recovered, delivered the same to the said D, sheriff as aforesaid, to be by him levied and returned ; by which same precept, the said D was commanded [*as in the execution ;*] yet the said D, at &c., suffered the said A to escape out of the jail aforesaid, and go at large, and returned the said execution entirely unsatisfied, without doing any thing in pursuance thereof ; by means whereof neither the said A, nor his goods or estate were ever since to be come at ; and the plaintiff, by the said D's misconduct and laches as aforesaid, hath utterly lost his debt and costs aforesaid.

Altered from PRATT.

Against jailer for suffering an escape of debtor in execution.

For that the plaintiff by the consideration of our justices of our court of &c., holden at &c., within and for the county of &c., on &c., recovered judgment against one R, of &c., for the sum of \$—, and also \$—, costs of suit, as by the record thereof, remaining in the same court, appears. And the plaintiff, in order to have said judgment executed, afterwards, on &c., sued out of the clerk's office of our said court, our writ of alias execution upon the said judgment, against the said R, directed to the sheriff of our said county of &c., or his deputy, in form of law in such cases prescribed ; and afterwards, on the same day, at &c., aforesaid, delivered the same writ of execution to the said D, then and ever since, sheriff of the same county, and keeper of our jail aforesaid, in &c., aforesaid, to be by him executed according to the precept thereof ; and afterwards, pursuant to the precept thereof, the said D duly took the body of the said R, and committed him to our jail aforesaid, and afterwards made due return thereof, as he was in the same writ directed ; and thereupon the said D, by law, became obliged, and by the said writ was commanded the said R in said jail to detain in his custody, until he paid the aforesaid sum of \$—, and also the further sum of \$—, for the same writ and a former writ of execution, or that until the said R should be discharged by order of the plaintiff. Now the

plaintiff in fact saith, that neither of the sums aforesaid were ever paid; nor did he ever discharge the said R; yet the said D did not there safely keep or detain the said R, but did there so carelessly and negligently keep and detain him, that, by means of the carelessness and negligence of the said D, the said R was suffered to escape, and by means thereof, did, on &c. escape out of the jail aforesaid, and custody aforesaid, and cannot now be found; by means whereof the said D, thereupon became liable, according to law, to pay the plaintiff the two last mentioned sums on demand; yet he hath not paid the same, though requested, but detains the same.

G. LEONARD, Jr.

Against sheriff who was also jailer, for an escape on mesne process, after commitment.

For that the plaintiff, by the consideration of our justices of our S. J. Court, [*or Court of C. P. as the case may be*] held at &c., on &c., in and for our county of &c., recovered judgment against one A B, of &c., for the sum of \$—, debt or damage, and \$—, costs of suit, as by the record thereof, remaining in the same court, appears; and on &c. sued out our writ of execution thereon, in due form of law, directed to the sheriff of our said county of &c., or his deputy, and returnable into the same court [*or into the clerk's office of our said Court, if so,*] on &c.; and on &c. at &c., delivered the same writ to one G H, then and ever since a deputy-sheriff under the said D, who then was, and ever since hath been, sheriff as aforesaid, and keeper of our jail in the county aforesaid, in due form of law to be executed; by force whereof the said G afterwards, and before the return thereof, to wit, on &c., at &c., for want of goods &c., of the said E F, took his body, and committed him to our jail in &c., and to the custody of the said D, then and yet keeper &c. as aforesaid; and by force thereof, the said E F was in the custody of the said D, sheriff and keeper as aforesaid, until &c., when the said D suffered the said E F to escape out of his custody, and go at large where he would, without the consent of the said plaintiff, who then was, and still is, unsatisfied for his debt and costs aforesaid, and every part thereof; whereby an action has arisen to the said plaintiff, to demand and have of the said D, the aforesaid debt and costs, amounting in the whole to \$—; yet, &c.

Against sheriff for the default of his deputy in suffering an escape after a taking in execution

For that whereas the said plaintiff, by the consideration of the justices of the court of C. P., held at &c., within and for the said county of &c., on &c., recovered judgment against one E, of &c., in said county, mariner, for the sum of \$—, damage, and \$—, costs of the same suit, as by the record thereof, in that court remaining, appears; and afterwards, viz. on &c., the said plaintiff sued out a writ of execution thereupon, in due form of law, directed to the sheriff of the said county of &c., or his deputy, commanding him among other things, of the goods, chattels, or lands of the said A within his precinct, to cause to be paid and satisfied unto the said plaintiff, at the value thereof in money, the aforesaid sums, with \$— more for the said writ of execution, and for want of goods, chattels, or lands of the said A, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the said plaintiff, to satisfy the sums aforesaid, to take the body of the said A, and him commit unto the jail of said commonwealth, in &c., and to detain him in the said jail, until he should pay the full sums abovementioned, with the fees of said sheriff or his deputy, or be discharged by the said plaintiff, the creditor or otherwise, by order of law, and to make return thereof into the said court of C. P. holden at &c., on &c., and afterwards, to wit, on &c., at &c., the said plaintiff delivered the said writ of execution unto B, then one of the deputies of the said E, to be by the said B, duly executed and levied, and afterwards, on &c., the said B, one of the deputies of the said E aforesaid, for want of goods, chattels, or lands of the said A, took his body and him had in custody, by virtue of the said writ; yet the said B, thereafterwards, viz. on the same day, not regarding his duty, and the command of the said writ, but contriving to defraud the said plaintiff of the whole benefit of his said writ of execution, and his judgment aforesaid, did wickedly and voluntarily suffer and permit the said A to escape and go at large out of his said custody, without the consent of the said plaintiff, who remains wholly unsatisfied of his damages and costs aforesaid, so that by means of the said wilful neglect and misconduct of the said B, the said plaintiff hath wholly lost all benefit of the judgment and execution aforesaid; to the damage of the said plaintiff, as he says, the sum of &c. *Russel v. Farley, C. C. P. Essex, 1786.*

S. SEWALL.

Against sheriff for neglect of deputy to return alias execution, and for not paying over to plaintiff.

For that whereas the plaintiff, by the consideration of our justices, &c. recovered judgment against one C of &c., for the sum of \$—, damages, and \$—, costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, to wit, on &c., the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of &c., or his deputy, commanding them, among other things, that of the goods, chattels, or lands of the said C, within their precinct, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums, with &c., for our said writ of execution; and for want of goods, chattels, or lands of the said C, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C, and him commit unto our jail in &c., until he should pay the full sums abovementioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, the creditor, or otherwise, by order of law; and to make return of our said writ of execution, with their doings thereon, into the clerk's office of our said court of &c., on &c. And afterwards, to wit, on the same day, at &c. the plaintiff delivered our said writ of execution to one E, of &c., then and ever since one of said sheriff's deputies, for our said county of &c., and for whose doings in his said office the said sheriff is answerable by law, to be duly executed; and requested the said E to serve, execute, and return the same, according to the precept thereof; and the said E, then and there received the same of the said plaintiff, to be served, executed, and returned, according to the precept thereof. And afterwards, before the return of said writ, to wit, on &c., at &c., the said E received of the said C, \$—, in part satisfaction of said execution; and afterwards, to wit, on &c., returned the same execution into our said court, to which the same was returnable as aforesaid, satisfied in part, to wit, for the sum of \$—. And afterwards, to wit, on &c., at &c. the plaintiff took out and delivered to the said E, an alias execution upon said judgment, for the remainder then due thereon, in the same form with the first, directed to the same officers, and containing the like commands with the first, as to levying the same, and returnable into said court, on &c., at &c.; by virtue of which,

the said E afterwards, to wit, on &c., at &c., received of the said C, the further sum of \$—, in part of said alias execution, and well might and ought to have served the said execution on the said C, for the remainder, according to the precept of said writ; yet the said E then and there neglected so to do; nor did he return the last mentioned execution, according to the precept thereof; nor has he ever paid said sums, by him received on said executions, to said plaintiff, though requested, at &c., on &c., as by law and the duty of his office, he might and ought to have done; but hath neglected and refused, and still neglects and refuses to pay them; and so the said plaintiff hath wholly lost the benefit of said judgment and executions, for recovering the sums aforesaid, to the damage, &c. T. BRADBURY.

Against sheriff for neglect of deputy to take a debtor in execution.

For that whereas the plaintiff, by the consideration of our justices &c., recovered judgment against one C, of &c., for the sum of \$—, damages, and \$—, costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, to wit, on &c., the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of &c., or his deputy, commanding them, among other things, of the goods, chattels or lands of the said C, within their precinct, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums, with &c. for our said writ of execution; and for want of goods, chattels or lands of the said C, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C, and him commit unto our jail, in &c., and detain in custody until he should pay the full sums abovementioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, the creditor, or otherwise by order of law; and to make return of our said writ of execution, with their doings thereon, into the clerk's office of our said court of &c., to be holden at &c., on &c.; and afterwards, to wit, on the same day, at &c., the plaintiff delivered our said writ of execution to one D, of &c., then and ever since one of said sheriff's deputies, for our said county of &c., and for whose doings in his said office, the said sheriff is answerable by law, to be duly executed; and requested the said D, to serve, execute and

return the same, according to the precept thereof. And the said D, then and there received the same of the said plaintiff, to be served, executed and returned according to the precept thereof. And afterwards, before the return of said writ, to wit, on &c., at &c., the said C was in the presence of the said D; yet the said D, in no wise regarding the duty of his said office, but contriving and fraudulently intending to deprive the plaintiff of his proper remedy to obtain satisfaction and payment of the aforesaid sums, amounting to \$—, did then and there wilfully refuse and neglect to take the body of the said C, according to the command of our said writ of execution, though the said D might then and there easily have taken or arrested the said C; nor hath the said D, at any time since, taken or arrested the said C, upon our writ of execution, or in any wise satisfied the plaintiff for the sums aforesaid. And the said C hath, ever since the day of the return of the said writ, absconded and escaped into places altogether unknown; so that the plaintiff hath, by means of the said D's wilful neglect of his duty aforesaid, totally lost all benefit of the payment and execution aforesaid, &c.

F. DANA.

Against sheriff for neglect of duty of deputy in omitting to arrest plaintiff's debtor, and to attach his goods on mesne process.

For that whereas at &c., on &c., one R W, by his note under his hand, for value received, promised the plaintiff to pay him or his order &c., on demand, with lawful interest till paid; and afterwards, on &c., the contents of the said note being unpaid, though the said R W was before duly requested, the plaintiff, for the recovery of his due damages for the breach of that promise, purchased out of the office of the clerk of our court of C. P. for said county, our writ of attachment, in due form as by law is required, directed to the sheriff of &c., commanding them among other things, to attach the goods and estate of the said R, to the value &c., (*in common form*) to answer to the said E, upon his declaration therein at large set forth, and to have the same writ, with their doings thereon, at the same court as by the record of the same writ, in the same court remaining, more fully appears. And afterwards, to wit, on &c., at &c., the said E delivered the same writ to one I K, then and ever since a deputy-sheriff for the same county, duly authorized and qualified under the said D, who then was, and ever since has been, sheriff of our said county, and then and there was,

and still is, by law, answerable for the neglect of the said I, his deputy aforesaid, to be by him, the said I, duly executed, served, and returned, according to the precept thereof; and afterwards, on the same day, at &c., the said I, being possessed of the same writ, was present and in company with the said R, and could have attached his body; yet the said I, regardless and negligent of his duty in this particular, did then and there utterly refuse and neglect to attach the body of the said R, as he might have done; neither did the said I, at any time, by force of the same writ, attach the goods of the same R, to the value of \$—, as he was therein commanded; but thereafterwards on the same day, attached a chair of no value, as the estate of the said R, and at the same court of C. P. returned the same writ, and thereon, among other things, falsely returned, that he could not take the body of the defendant, (meaning the said R,) and that he had attached a chair as his estate, being all he could find; by reason of which neglect and misdoing of the said I, the said C hath altogether lost the aforesaid sum of \$—, together with the lawful interest therefor, and such other due damages as he might have recovered for the payment thereof, and his lawful costs of that suit, &c.

JONA. SEWALL.

Against sheriff for not returning a writ.

For that the plaintiff, on &c., purchased our writ of attachment out of the office of the clerk of our court of C P for our county of S, in form by law prescribed, for the recovery of the sum of \$—, with interest, due to the plaintiff from one J B, then an inhabitant of &c., by his, the said B's note of hand, dated &c., as also for the recovery of a further sum of \$—, due to the plaintiff from the said B, according to the said B's negotiable note, indorsed to the plaintiff; and the plaintiff declared accordingly, in his said writ of attachment against the said B, in a plea of the Case, setting forth the sums due from the said B, on the notes aforesaid, and the plaintiff's damage by the said B's neglecting to pay the said sums to the plaintiff; and the said writ was directed to the sheriff of our said county of &c., or his deputy, commanding them, &c. [*in common form.*] And afterwards, viz. on &c., at &c., the plaintiff delivered the said writ to the said T, then and to this day sheriff of our said county of &c., to be executed and returned into the then next court of C. P., which was held at &c., in and for

the said county of S, on &c. and the said T, then and there promised to serve and return the same writ accordingly; yet the said T, neglecting in the premises, never made any return of the said writ, or of his doings therein, to the said court, when and where it was returnable as aforesaid; nor did any of his deputies make any return thereof, but secreted the same; whereby the plaintiff hath lost the benefit thereof, and of the said notes, which remain yet unpaid. *Sutcliffe v. Moulton.*

NOTE. In an action against the sheriff for a false return on mesne process, the declaration should state, that the plaintiff had good cause of action against the defendant in the original action, by stating "that he was indebted to him for money lent, goods sold, &c.;" and the plaintiff should prove such averment. Esp. N. P. C. 477, notes. And this rule is required, it seems, in all cases of mesne process; and such evidence as would charge the defendant, in the original action, will be sufficient proof of the debt against the sheriff. Esp. N. P. C. 695; Peake's N. P. C. 65. It is best also, if the truth of the case will admit, to state, that the defendant is now insolvent.

Against the same, for deputy's not returning an execution.

For that whereas the plaintiff, by the consideration of our justices of &c., held at &c., within and for the county of &c., on &c., recovered judgment against one A B, of &c., for the sum of \$—, damages, and \$—, costs of suit, as by the record thereof, in the same court remaining, appears; and afterwards, on &c., the plaintiff sued out our writ of execution, in form prescribed by law, directed to the sheriff of said county of &c., or his deputy, returnable into the same court, on &c.; and on &c., at &c., the plaintiff delivered our said writ of execution to one C, of &c. then and ever since one of the said T's deputy-sheriffs in and for our said county of &c., and for whose doings in his said office, the said T is by law answerable, to be duly executed and returned accordingly. Yet the said C, in no wise regarding the duty of his office aforesaid, utterly neglected and refused to return our said writ, according to our command therein, nor hath the said T, or any of his deputies ever done it. Whereby the plaintiff hath lost the benefit of the said judgment and execution. R. DANA.

For negligently searching and packing beef.

For that whereas the said plaintiff, at &c., on &c., was possessed of one hundred and eight barrels of beef, of the value of &c., which the said plaintiff had then before agreed

to sell to one A A, and which he had contracted and engaged to deliver to the said A A, in shipping order, and whereas the said T was then and there a searcher and packer of barrel beef, duly appointed and sworn, the said plaintiff then and there employed the said T, so being such searcher and packer as aforesaid, to search and pack the said one hundred and eight barrels of beef, and to see and take care, that there should be good salt in each cask, sufficient to preserve the said beef from damage, and to keep the same in shipping order, and then and there delivered the said beef to the said T, for the purposes aforesaid, and likewise then and there, provided and delivered to the said T, good and sufficient salt to preserve the said beef from damage as aforesaid, and to be used for that purpose; and the said T, in consideration of the premises, then and there promised the plaintiff, that he would carefully and skilfully search and pack the said one hundred and eight barrels of beef, and would see and take care, that there should be good salt in each cask thereof, sufficient to preserve the said beef from damage, and keep the same in shipping order; yet the said T, not regarding his promise aforesaid, nor his duty in his said office, employ, and duty of a searcher and packer of barreled beef, afterwards, to wit, at said &c., on the same &c. day of &c., did not see and take care that there should be good salt in each cask of said beef, sufficient to preserve the said beef from damage, and to keep the same in shipping order, but did then and there so carelessly and unskilfully search and pack the said one hundred and eight barrels of beef, that by and through the mere carelessness, neglect, and default of the said D, in the premises, the said beef was not kept in shipping order, whereby not only the said beef was greatly damaged, but the said A A, to whom the said plaintiff afterwards sold and delivered the said beef, according to his promise and agreement abovementioned, caused the said one hundred and eight barrels of beef to be opened and searched and packed anew, and a large quantity of salt to be added and put into each of the said barrels, to put and keep the said beef in shipping order as aforesaid; and the said plaintiff has been compelled to pay, and has paid, a large sum of money, to wit, the sum of \$—, for the salt so added to the said barrels as aforesaid, and for the cooper's bill, and for other charges and expenses in opening, searching, and packing the said beef anew, as abovementioned, to wit, at said, &c.

SECOND COUNT.— And for that whereas at said &c., on the &c. day of &c., the plaintiff was possessed of one hundred and eight barrels of beef other than those above mentioned, of the value of &c., which the plaintiff had then before agreed to sell to one A A, and which he had contracted and engaged to deliver to the same A A, in shipping order, the plaintiff then and there employed the said T, as the servant of him, the plaintiff, for a certain reasonable reward to be therefor paid by the plaintiff to the said T, to pack the said last mentioned beef so as to preserve the same in shipping order, and then and there delivered the said last mentioned beef to the said T, for the purposes aforesaid, and the said T, in consideration of the premises, then and there promised the plaintiff, that he would carefully and skilfully pack the said last mentioned one hundred and eight barrels of beef, so as to preserve the same in shipping order; yet the said T, not regarding his promise last above mentioned, did not, carefully and skilfully pack the said last mentioned beef, so as to preserve the same in shipping order, but there-afterwards, on the same day, did so carelessly and unskilfully pack the same beef, that by and through the mere carelessness, neglect and default of the said T, in the premises, the same beef was not preserved in shipping order, whereby not only the same beef was greatly damaged, but the same A A, to whom the plaintiff afterwards sold and delivered the said last mentioned beef, according to his promise and agreement last abovementioned, caused the same one hundred and eight barrels of beef to be opened, searched, and packed anew, and a large quantity of salt to be added and put into each of the same barrels, to preserve the same beef in shipping order as aforesaid, and the plaintiff has been compelled to pay, and has paid, another large sum of money, to wit, the sum of \$— for the salt so added to the same last mentioned barrels as aforesaid, and for the cooper's bill and other necessary charges and expenses in the opening, searching and packing anew the said last mentioned beef, as aforesaid, to wit, at said, &c. *Proctor v. Greenleaf.* C. JACKSON.

Against a coroner for not serving an execution, but returning it fully satisfied by taking note of debtor for the amount.

For that whereas the plaintiff, by the consideration of our justices of our court of C. P., held at &c., on &c., within and for the county of &c., recovered judgment against A,

&c., sheriff &c., for \$— debt, and \$— costs of suit; and on &c. took out a second writ of execution thereon, in form by law prescribed, directed to the coroner of our said county, or his deputy, and returnable &c.; and on &c., delivered it to the said D, then and still coroner of the same county, to be executed and returned according to law; yet the said D hath not executed the said writ, nor made any lawful return thereupon; but on &c., returned thereupon into our said court, that he had taken of A, his note for the satisfaction of the said execution, and returned it fully satisfied, whereby the plaintiff hath lost the benefit of the said execution; to the damage, &c.

Against sheriff, for his deputy's releasing goods attached.

For that one B C was indebted to the plaintiff in the sum of \$—, for certain goods before that time sold and delivered to said B C at his request; and the plaintiff, in order speedily to recover said debt, on &c., sued out, in due form of law, our writ of attachment against the said B C, returnable to our court of C. P. then next to be holden at &c., on &c., within and for the county of &c., and directed to the sheriff of our said county, or his deputy, to serve and return the same according to law; and afterwards, on &c., the plaintiff delivered the same to one E F, then and still a deputy-sheriff of the said D, [defendant] high sheriff of the said county, who, by virtue thereof, attached [*insert the goods*] all of the value of \$—, the estate of the debtor aforesaid, and served and returned the said writ accordingly to the said court of C. P., to which the same was returnable as aforesaid; at which said court the plaintiff entered his action aforesaid, and thereupon, by the consideration of our justices of the same court, recovered judgment for the said sum of \$—, and \$— costs of suit, as by the record, &c.; yet neither the said D, nor any of his deputies, for whose defaults he is answerable, did retain and keep the said goods for the space of thirty days after the judgment aforesaid was rendered, to the end that the plaintiff might take them in execution to satisfy said judgment, being no otherwise satisfied within that time; but within the said thirty days they released the said goods, and discharged them from the arrest aforesaid, against the law in that case provided. And the plaintiff avers, that the same judgment is still unsatisfied; whereby the plaintiff has lost his whole debt and costs aforesaid.

Against Justice of the Peace, for fraudulent and corrupt conduct in his office.

For that the said D, on &c., was, and from that time to this has been, and is, one of our justices assigned to keep the peace within and for our said county of Essex. And the plaintiff, on &c., was pregnant with a female bastard child, afterwards born of her body, and now alive. And one R M, then of L aforesaid, mariner, but since deceased, was the father of said child, and was liable to be pursued by the plaintiff, and held to assist her in the maintenance of said child. And the plaintiff, afterwards, viz. on &c., made complaint and oath, at M, in the same county, before J B, Esq., one of our justices assigned to keep the peace in and for our said county, that the said R had begotten her with child, with which she was then pregnant; and procured a lawful warrant, directed to the sheriff of said county, or his deputy, or either of the constables of L, aforesaid, ordering them to apprehend the said R, and to have him before the said justice, or some other justice of the same county, that a lawful proceeding might be had against the said R upon the complaint aforesaid. And afterwards, viz. on the same day of &c., the plaintiff delivered the said warrant to one W P, then a constable of the said town of L, to be by him executed. And afterwards, on &c., the said constable, by force of the said warrant, took the body of the said R, and some time after, in the same month, carried him before the said D in said L; and at the same time, he, the said D, at his own house at L, aforesaid, undertook to take cognizance of the said warrant and complaint; but the said D, then and there, contrary to his duty and oath as a justice of the peace, corruptly and fraudulently contriving to deceive and injure the plaintiff, and prevent her from having any benefit from the complaint and warrant aforesaid, by taking the said R as aforesaid, wrote a false and deceitful return of the said W P's doings, on the back of said warrant, and caused the said constable to sign it; in the same return setting forth that the said W P, constable as aforesaid, had, by virtue thereof taken the said R, and carried him before the said J B, Esq., all which was contrary to the truth; yet the said D kept the said warrant, and against the will of the plaintiff, declared, that his court for the hearing of the complaint and procedure thereon, was adjourned to some future day, without causing the said R to be bound to appear at any other

time or place to answer the plaintiff's complaint and warrant aforesaid. And the said D suffered and caused the said R to make his escape. And the said R was carried beyond the seas, and there died, without ever returning; whereby the plaintiff could never procure the said R to be taken after he had so escaped, and has lost all benefit of the warrant and complaint aforesaid, and has been put to great trouble and expense thereby, for the process aforesaid, and been forced to maintain the said child herself, by reason of the negligence, misfeazance, and fraud of the said D, in his office of justice of the peace, as aforesaid; all which is to the damage, &c. *Merry v. Collins.*

NOTE. If a judge in the ordinary exercise of his jurisdiction commit an error, he cannot be prosecuted; but if he commit an error in acting beyond his jurisdiction, he is not protected. *See the King v. Sainbury*, 4 T. R. 451. Lord Ellenborough in *R. v. Picton*, 30 Howell's St. Tr. 480.

6. *Malicious Prosecution, Conspiracy.*

Where a criminal prosecution, or a civil suit is commenced against one, from malice or other corrupt motive, without ground or probable cause, an action on the case may be maintained for a malicious prosecution. But malice and the want of probable cause must both concur, or the action cannot be maintained. For, if there is apparently a good cause of action, the law will not inquire into the motives of the party instituting the suit. And, if there is no malice, the ground of action fails. But, if there is no probable cause for the original action, a *prima facie* case of malice will be made out, and the *onus probandi* to rebut it, will lie upon the defendant. But, where the plaintiff claims title to any thing in a civil action, no malice can be inferred from his failing in his suit, if there are no circumstances of oppression, in the mode of conducting it. For every man has a right to appeal to the regular tribunals of justice, for the decision of his claims, and the costs, which in such suit, he is compelled to pay the defendant, operate as a sufficient check to litigation, and afford the defendant a sufficient recompense for his time and trouble. Yet, if any special damage accrued in consequence of such malicious and groundless suit, it seems most probable that the court would sustain the action. For it has been settled, that where a person, for the sake of oppressing another, holds him to bail for a much larger sum than he really owes, whereby he is imprisoned, such person may recover for the injury in this action. 1 Sid. 424. *A fortiori*, it would seem an action might be maintained, if the plaintiff was imprisoned on an action wholly groundless. 1 Saund. 228. *See Watkins v. Baird*, 6 Mass. R. 506.

So also this action might be maintained for any special damage, if the goods of a person should be attached and removed on a groundless and malicious suit. Doug. 677. But not without special damage. *See Lord Raymond*, 390. So for commencing a suit in a court, which the plaintiff *knows* can have no jurisdiction of the cause. 2 Wilson. 303.

So for commencing a suit in another's name, without authority from him, and whether such person had a cause of action or not. *Salkeld*, 14.

In this action, malice and want of probable cause are essential, but the want of probable cause, unexplained, will lead to the inference of malice. 4 Bur. 1974.

What amounts to probable cause is for *the court* to decide.

An action on the case, in nature of a writ of conspiracy, lies where two or more combine together maliciously and without probable cause, to prosecute another, or to procure him to be indicted, or to do him any other injury either in his person or property. *Salkeld*, 14. One alone may be sued, but it must be alleged, that he conspired with some other or others. See *Stra.* 144. Though if these words are omitted, it is only matter of form, being merely an aggravation. 6 Mod. 169.

The action on the case for a conspiracy is local, and must be brought where the conspiracy is alleged, and not where the indictment was tried, or where the deed was done. F. N. B. 265, M.

Where A on the same demand, commenced two different actions, and on each caused B's goods to be attached, and the latter of the two suits was abated by plea, and B recovered costs, it was held, that Trespass would not lie, and that Case is the proper and exclusive remedy for an injury of this kind. *Hayden v. Shed*, 11 Mass. R. 500. See also *White v. Dingley*, 4 Mass. R. 433.

Of the declaration in this action, &c.

The declaration must allege malice and want of probable cause. 1 Leo. 108; 9 East's R. 361; 1 Term Reports, 544; 4 Bur. 1971; *Salkeld*, 14.

If for a malicious prosecution of a civil suit, it must show that the suit is terminated. Doug. 215; 2 T. R. 225; 2 Wils. 210.

If for a malicious criminal prosecution, it should set forth that the plaintiff was acquitted, or that the jury found *ignoramus* to the bill. 12 Co. 23; 1 Sid. 15; 9 East's R. 157.

Or otherwise, that the defendant knew that the court had not jurisdiction.

It is not sufficient to aver, that the plaintiff was discharged from imprisonment, because that does not show that the prosecution is at an end. An acquittal for want of prosecution, or a *non pros*, does not furnish an inference of malice; but from the want of probable cause, malice is usually inferred. 9 East's R. 361; 4 Taunt. 7; 1 T. R. 784.

The proceedings on the original prosecution on which this action is grounded, should be set out accurately and truly, so far as necessary, or it will be fatal.

Malicious prosecution and slander, on a charge of shooting a colt, &c.

For that whereas the said plaintiff is, and always was, a peaceable, quiet, and honest person, free from the crime of secretly, privately and maliciously destroying his neighbor's goods or chattels, or injuring them or others of the good citizens of this commonwealth, privately or maliciously, in their persons or estate; of all which the said D was well

knowing ; but he, maliciously contriving to injure the said plaintiff, destroy his character and reputation, and expose him to trouble, cost and charge, did, on &c., at &c., falsely and maliciously complain to E F, Esq., a justice of the peace for the county aforesaid, that, on &c., at &c., some evil-minded person did, with force and arms, and a hand-gun charged with large shot, shoot and kill a dark grey horse colt of said T, and thrust him into a hole in the ground ; and that the said T justly suspected that said plaintiff and one G were the persons who committed the act aforesaid, and thereby caused the said plaintiff to be apprehended and had before the said justice, at &c., to answer the charge aforesaid, when and where the said T appeared, and pursued the charge aforesaid against the said plaintiff ; notwithstanding which, the said plaintiff was, by the said justice, discharged and dismissed. And the said T continued his malice aforesaid, and did afterwards, on &c., at &c., in the hearing of divers good citizens, falsely and maliciously publish and declare, that the said plaintiff was a pitiful and malicious person, and that he and said G, being angry with the said T, did severally and maliciously kill the same T's colt, and bury him in the said hole, that the villainy might not be discovered. Now the said plaintiff, in fact says, that the said plaintiff, neither alone, nor with any other person, ever hurt, killed or bruised any horse or colt of the said T, and that the said T had neither lawful nor probable cause for making the complaint aforesaid, or charging the said plaintiff with killing, burying, or hiding his, the said T's, colt ; and that the said plaintiff has, by means of the said T's making the complaint aforesaid, and speaking the words aforesaid, been, by divers of his neighbors and others, suspected of being guilty of the crimes charged on him as aforesaid, and has lost their good will and esteem, and been obliged to expend much time and money in vindicating himself against the said T's unjust charge and malicious prosecution aforesaid, and has suffered much uneasiness and disquietude ; to the damage, &c.

TROWBRIDGE.

NOTE. In this action, the plaintiff must always allege *malice* in the defendant, and in addition, *want of probable cause* or *an intent to oppress*, or a knowledge that the court had not jurisdiction, and must state the prosecution at an end. 2 Wil. 302 ; B. N. P. 11 ; 8 Bl. Com. 127 ; Salk. 14, 15 ; Doug. 215 ; 9 Co. 55 ; 3 Salk. 246 ; 2 Wil. 210 ; 4 T. R. 247 ; 3 Salk. 98, 216.

Slander and malicious prosecution on a charge of theft.

For that the plaintiff is, and always from the time of his nativity, was a person of good fame, and free from the crime of theft, and all suspicion thereof, and on &c., was, and for a long time before had been, a master of a vessel trading to parts beyond seas, and intrusted with the goods, and to negotiate the affairs of sundry merchants; by which business he got a considerable profit and gain; and on said day was bound on a voyage for foreign parts; of all which the said T was well knowing, but maliciously intending and contriving to destroy the plaintiff's good name and reputation, and ruin him in said business, and subject him to the penalties of the law against theft, on &c., at &c., falsely and maliciously, in the hearing of many of our good [citizens] uttered the following false and scandalous English words, of and concerning the plaintiff, viz. "I have been told A," meaning the plaintiff, "is as great a thief as any in the country." And afterwards on the same day, at the place aforesaid, in the hearing of divers other good [citizens of this commonwealth,] the said T uttered the following false, scandalous, and malicious words, of and concerning the plaintiff, viz. "last night my pocket was picked, and my pocket-book taken out of it; and it was A," meaning the plaintiff, "that did it: I have reason to think he," meaning the plaintiff, "stole them." And then and there, the said E went before B G, one of the justices of the peace for said county, and falsely and maliciously complained to him of his, the said T's, having his pocket picked of the sum of &c., and of his pocket-book, and accused the plaintiff of stealing them, and then and there falsely and maliciously affirmed, that he had reason to think of the plaintiff's being guilty of said crime, and thereupon procured and caused the said plaintiff to be arrested and brought before the said B G, and then and there, before the said B G, falsely and maliciously accused the plaintiff of the aforesaid crime, and prosecuted him therefor, and knowing the plaintiff to be innocent of the said crime, maliciously endeavored to get him convicted thereof; on which prosecution the plaintiff was, notwithstanding, lawfully acquitted thereof; but the plaintiff by said prosecution was delayed in his voyage aforesaid, put to great costs and trouble in defending himself, and greatly hurt and injured in his reputation and business.

E. PRATT.

Malicious prosecution on a charge of theft.

For that the said plaintiff is a person of good fame and credit, free from the crime of stealing and the imputation thereof; of all which the said D was well knowing; yet the said D, wickedly contriving and maliciously intending to deprive the said plaintiff of his good name, and cause him to be imprisoned and vexed, on &c., at &c., maliciously, and without any just and probable cause, complained to and swore before C D, Esq. one of the justices &c., against the said plaintiff, that he, the said plaintiff, had feloniously taken and carried away out of a certain snow, called the Sally, thirty-six dozen of stone rings, of the value of \$—; and thereupon the said plaintiff was arrested and brought before our said justice, on said complaint and oath aforesaid; and our said justice, on &c., at &c., by means of the said D's false and malicious complaint and oath aforesaid, committed the body of the said plaintiff to our common jail, in &c., there to be safely kept until discharged by due course of law; in which jail said plaintiff was kept imprisoned, among felons and malefactors, from &c., to &c., when he was discharged from his imprisonment aforesaid by our said justice, upon his recognising, with two sufficient sureties, to appear personally at the [quarter] Sessions for the county of &c., to answer the charge aforesaid, and in the meantime to be of good behaviour towards all persons, and abide the order of the said Sessions; and the said plaintiff accordingly made his personal appearance at said Sessions; but the said D did not appear to prosecute said complaint; and thereupon the said plaintiff by our said court of Sessions was discharged and let go, without delay. Now the said plaintiff in fact says, that he was entirely clear and innocent of feloniously taking and carrying away, out of the snow aforesaid, the goods aforesaid; and that by means of the said D's false and malicious oath and complaint, he hath suffered imprisonment for the space of &c. days as aforesaid, and was obliged to find sureties for his appearance as aforesaid; and thereby he hath suffered great ignominy and reproach, and hath lost much time, and is deprived entirely of the means of getting into business, &c. *Salk.* 768; *Gilb. Cases*, 168, 156; *Salk.* 728, 729; 2 *Wils.* 302; *Doug.* 215.

Malicious prosecution for perjury.

For that whereas the plaintiff is, and always has been, a man of truth, and of good repute and fame, and well known

for it among all his neighbors, and free from the crime and suspicion of perjury; yet the said D, well knowing this, but maliciously contriving to bring the plaintiff into disgrace, and put him to great costs and charges to vindicate himself, on &c., at &c., charged the plaintiff before &c., with wilful perjury, and caused him to be bound over to our Supreme Judicial Court, to be holden at &c., on &c., within and for the said county of &c.; and then and there caused a certain bill of indictment to be drawn up against the plaintiff, charging him with wilful and corrupt perjury, and the same to be laid before the grand jury for the body of the said county, which, by reason of the plaintiff's innocence, the grand jury aforesaid returned ignoramus; and the plaintiff was accordingly discharged; by all which unjust prosecution of the said D, the plaintiff was put to great costs and charges, and suffered in his name and reputation. READ.

Malicious prosecution on a charge of felony.

For that the said P, being a good, true and faithful subject of this commonwealth, and having behaved and conducted himself as a good, true, and faithful subject of this commonwealth, from his nativity to this present time, without any fault or suspicion of theft, robbery, felony, or other crime; and so among his neighbors, as well as others, was esteemed, known and reputed; yet the said T not ignorant of the premises, but contriving and maliciously intending to hurt, wound and injure the good name, fame, credit and estimation of the said plaintiff, and him unjustly to molest, vex, and disturb; and also to bring him into manifest danger of the loss of his life, goods and chattels, on &c., at &c., did falsely and maliciously, and without any cause or color of any felony of theft or robbery, of the said plaintiff ever committed, him the said plaintiff, for a certain felony, by him, then, at &c. aforesaid, supposed to be done, (when in truth no felony was so committed by said plaintiff) procured to be arrested; and at &c., (the court) the aforesaid T, to bring the aforesaid plaintiff in danger of the loss of his life, and forfeiture of all his lands, tenements, houses, and chattels, falsely and maliciously, then and there caused a certain bill of indictment against the said plaintiff to be written, containing in it the false and scandalous matter following, to wit, [*recite the indictment*;] and the same indictment, in the form aforesaid written, containing in it the false and scandalous and malicious matter before recited, the afore-

said T afterwards, to wit, on &c., to the justices of the same court, caused to be delivered, which said bill of indictment the same justices then and there of the same T received, and caused the same publicly to be read; and thereupon the jury of the grand inquest for the same county of &c., at the same court, on their oaths, then and there being charged and sworn then and there to deliberate, and true inquiry to make of and concerning said matter, in the same bill contained, &c. (*reciting the proceedings to the end.*) Now, by reason of the premises, the said plaintiff is greatly injured, not only in his good name, fame, credit, and reputation, but put to great expense, &c.

NOTE. See declaration in Lilly's Ent. 62, which states, that the defendant at such a court, for such an offence, "without any probable or just cause, caused the plaintiff to be indicted; and the same plaintiff on that account, prosecuted until he, the plaintiff, was thereof duly acquitted," without stating whether it was by verdict or otherwise.

Malicious prosecution of civil action.

For that the said T, on &c., at &c., without any lawful or just cause of action, or the least color of right, purchased out of the clerk's office of our court of C. P. for our said county of Worcester, our writ of attachment against the plaintiff, bearing teste the — day of &c., returnable to said court of C. P., next then to be holden at &c., on &c., within and for the said county of Worcester; and therein the said T complained, that, on &c., at a place called Quebec, viz. at W aforesaid, he, the said T, was possessed of one hundred boxes of soap, as of his proper goods and chattels, of the value of \$ —; and that the said T, thereafterwards, on the same day, casually lost the same goods and chattels, which, by finding, afterwards came into the hands and possession of the plaintiff, who well knowing that by right they belonged to the said T, afterwards, viz. on &c., at &c., converted them to his own use to the damage of the said T, as he said, the sum of \$—. Now the plaintiff in fact saith, that at the time of the purchase of our said writ against him, in form aforesaid, he was not, nor at any time before had been, possessed of said goods and chattels of said T, nor in any respect had converted them to his, the plaintiff's, own use, as the said T, in his declaration did falsely allege; of which the said T was well knowing; yet contriving and maliciously intending to vex, injure, and oppress the plaintiff in this particular, and to the utmost of his

power, to ruin the plaintiff's reputation, he, the said T, on &c., at &c., by force of our said writ of attachment, and under color of the law, did cause the plaintiff to be arrested and imprisoned, he being then a stranger in this commonwealth, and without any estate therein or friends to whom he could apply, for the sake of giving bail to respond said action; and him, so arrested and imprisoned, the said T did then and there hold and detain from &c., to &c., when one B and one C, compassionating the plaintiff's unhappy and forlorn condition, became his bail, and did then and there give security in the sum of \$—, for the plaintiff's appearance at our said court, according to the tenor of said writ, and abiding the judgment thereon. And the plaintiff further avers, that, at the said court, to which the said writ was returnable as aforesaid, he duly appeared; and the said T, after entry of his action aforesaid, against the plaintiff, well knowing that he had no probable cause to maintain the same, there, in said court, suffered himself to be nonsuited in the action aforesaid; whereby, and by means of said causeless and malicious suit, so prosecuted by the said T against the plaintiff, and by reason of said imprisonment thereon, the plaintiff was unjustly compelled to expend great sums for his sustenance in prison, and for his defending himself against said suit, and was greatly injured in his rank and reputation, and suffered great pain and uneasiness, both of body and mind; and during that time his affairs and business, and especially the duty of his office as collector, &c. were greatly and necessarily neglected.

NOTE. The declaration in this action should always state *malice* and *want of probable cause*; Bull. N. P., 14: and also that the suit, if civil, is at an end, and the plaintiff legally discharged; if criminal, that the plaintiff has been legally acquitted; and it matters not, in the first instance, whether the plaintiff be discharged in consequence of verdict or nonsuit; nor, in the latter, whether the indictment was found by the grand jury or not; for maliciously preferring an indictment is actionable; 2 Str. 977; nor whether the plaintiff could have been convicted on the indictment or not; 1 Str. 691; for the indictment, if bad, serves all the purposes of malice. But the prosecution or suit, in all these cases, must be explicitly and clearly stated to be at an end; and if it is not, on demurrer the action would be defeated. 2 T. Rep. 232; Doug. 205; 1 Str. 114; Saund. 228. Where the action is for maliciously holding to bail, the plaintiff should state "that he was indebted to the defendant in such a sum, and no more, and that the defendant sued out a writ for so much more, on purpose to hold him to bail. Salk. 15.

Malicious prosecution of civil action whereby plaintiff was arrested and imprisoned.

For that the said D, on &c., at &c., maliciously intending

to oppress and unjustly to imprison the plaintiff, prosecuted out of the clerk's office of our court of C. P., &c., our writ of attachment, in due form of law, directed to the sheriff &c., commanding them to attach, &c., [*here recite the writ and declaration,*] and afterwards, there, on the same day, caused the plaintiff by force of the same writ, to be arrested, and for want of sufficient bail to the said writ, which the plaintiff could not obtain, to be committed to our jail in said &c. where the plaintiff was detained for the space of sixty days; and afterwards, *viz.* at our said Court of C. P., to which the said writ was returnable as aforesaid, and wherein the said writ and action of the said D, against the plaintiff was duly entered, it was adjudged and considered by our justices of the same court, upon the plea of the plaintiff, to that end made, that the aforesaid words, by the said D, in his writ and declaration aforesaid stated, and by the plaintiff supposed to have been spoken, were not actionable, and that the said writ should be abated therefor. And upon the said D's appeal from the said judgment of the court aforesaid, to our S. J. Court, held at &c., on &c., within and for the county of S, by the consideration of our justices of the same last mentioned court, it was adjudged, that the aforesaid judgment of the said court of C. P. should be affirmed. And the plaintiff in fact says, that the said D prosecuted the said writ against the plaintiff, for the sum aforesaid, and caused the plaintiff to be thereupon imprisoned as aforesaid, without having any lawful or probable cause for prosecuting said writ, and causing the imprisonment aforesaid of the plaintiff; but was wholly guided in the premises by wanton malice and a desire to oppress, injure and defraud the plaintiff; and the plaintiff further says, that, by such prosecution and imprisonment aforesaid, of him, the plaintiff, his business was greatly impeded, his reputation lessened, and he was at great expense, and suffered great vexation, grief, and oppression.

Malicious prosecution on a charge of theft.

For that the plaintiff is a person of good fame and credit, free from the crime of stealing, and the imputation thereof; of all which the said D was well knowing; yet the said D, contriving and maliciously intending to deprive the said plaintiff of his good name, and to expose him to imprisonment and vexation, on &c., at &c., maliciously and without probable cause complained to A B, one of the justices of

the peace, within and for the said county of &c., against the plaintiff, that he, the plaintiff, had stolen out of the said D's shop, and stolen and carried away certain goods of the plaintiff, &c., and caused the plaintiff to be brought before the said justice on said complaint, and the said justice on &c., committed the body of the plaintiff to the jail in &c. aforesaid, there to remain for further examination, touching said complaint, and on &c., the plaintiff was convened before the said justice to be further examined; but the said D appeared not to pursue said complaint, though duly notified by said justice of the time and place of said examination, and thereupon the plaintiff was by said justice lawfully discharged and let go without day; now the plaintiff says, that he was altogether innocent of said charge, and that by means of said D's malicious prosecution and complaint aforesaid, he suffered fourteen hours' imprisonment and also great ignominy and reproach.

J. ADAMS.

NOTE. If the plaintiff is convicted on the charge alleged to have been maliciously made against him by the defendant, before a court having jurisdiction, it will be conclusive evidence of probable cause, though the plaintiff is acquitted on an appeal to a higher tribunal. See *Whitney v. Peckham*, 15 Mass. R. 243.

7. *Declarations in Case for various other Torts.*

Brought by a town against defendant for bringing an aged pauper into town, and leaving him there.

For that the said T, at &c., on &c., intending to injure and defraud the said inhabitants, and to impose on them the charge and expense of maintaining and supporting one I G, then and there an aged, poor, helpless, and necessitous person, destitute of all property, and wholly unable to support himself, and whose settlement was not in the said town of B, and for whose support and maintenance the said inhabitants were not and are not by law liable, brought and transported the said G into the said town, and there left and abandoned him, without making any provision whatever for his support and maintenance; by reason whereof the said inhabitants have been at a great charge and expense in maintaining and supporting the said G, from the — day of &c. inclusively and have spent and laid out divers sums of money therefor; amounting to the sum of \$—, according to the schedule hereto annexed; all which is to the damage, &c.

T. PARSONS.

For Crim. Con. with plaintiff's wife.

For that whereas the said R, unjustly contriving and intending to injure the plaintiff, and to deprive him of the comfort and society of his wife E, and to alienate her affection from him, heretofore, *viz.* on &c., and divers other days, between that day and the day of the purchase of this writ, at &c., wrongfully and wickedly debauched and carnally knew the said E, then and there and still being the wife of the plaintiff, and thereby the affection of the said E for the plaintiff, was then and there alienated and destroyed; by means whereof the plaintiff hath thence hitherto wholly lost the comfort, society and assistance of the said E, in his domestic affairs, which the said plaintiff, during all that time, ought to have had, and otherwise would have had.

NOTE. To maintain this action, there must be proof of an actual marriage; reputation is not sufficient. 4 Bur. 2057.

Either Case or Trespass will lie, as appears by the precedents.

A husband may have an action on the Case against such as persuade and entice the wife to live separate from him, where no criminal conversation is pretended, if there is no sufficient cause for her leaving him. See Dane's Abr. ch. 19, art. 18. See also, Cro. Jac. 538. *Hyde v. Seyssor, a case of Trespass.* This law is fully recognized in *Turner v. Estes*, 3 Mass. R. 317.

But, it seems, there is no obligation to turn the wife out of the house, when forbidden to harbor her by the husband. It seems sufficient not to hinder the husband from coming to see his wife and taking her away with him, if he sees fit to do it by open force. If the party does not persuade the wife to leave her husband, he is under no obligation to commit a breach of hospitality by turning her out of the house. See *ibid.* The defendant in that case was the wife's son-in-law.

For debauching a daughter and getting her with child.

For that whereas the said R, contriving to injure the plaintiff, and to deprive him of the service of E F, the daughter of the plaintiff, heretofore, *viz.* on, &c., and on divers other days and times, between that day and the day of the purchase of this writ, at &c., debauched and carnally knew the said E F, then and there, and from thence for a long space of time, *viz.* hitherto, being the daughter and servant of the plaintiff; whereby the said E F became pregnant, and so remained for a long space of time, *viz.* nine months then next following, and, at the expiration thereof, *viz.* on &c., at &c., was delivered of the child with which she was so pregnant as aforesaid, *viz.* at — aforesaid; by means whereof the said E F, for a long space of

time, *viz.* from the day and year first abovementioned hitherto, was unable to do the necessary affairs of the plaintiff, so being her father and master as aforesaid, and thereby the plaintiff was deprived of her service, during the said time, *viz.* at —, and did necessarily lay out large sums of money, *viz.* \$—, in and about the nursing of the said E F, and the delivery of the said child.

NOTE. If the daughter is over twenty-one, no action can be maintained by the father, unless she is actually in his service. 10 Johns. 115.

For using plaintiff's patented invention.

For that whereas, by certain letters patent, duly issued in the name of the U. S. of America, by the Secretary of State, bearing teste by the president of the U. S. and dated the — day of &c., and in court to be produced, was granted to the said plaintiff, his heirs and assigns, for the space of fourteen years from the said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, his certain shearing machine, to shear woollen and other cloths, by water or otherwise, agreeably to a statute of the congress of the U. S., made and passed the 21st of Feb. 1793, entitled, "An act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose;" and whereas by the said statute, it is, among other things, enacted, "that if any person shall make, devise, or use, or sell the thing invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators, or assigns, first obtained in writing, every person so offending shall forfeit and pay to the patentee, a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed to other persons the use of the said invention." Now the plaintiff in fact says, that the said R, in no wise ignorant of the premises, but contriving in this behalf to injure him, the said plaintiff, and to deprive him of the benefit of his said patent, afterwards on &c., without the consent of the said plaintiff, the patentee as aforesaid, or his assigns, did make, devise, and use the said patent shearing-machine, so called, invented by and secured to the said plaintiff as aforesaid, contrary to the form of the statute aforesaid; whereby and by force of which said statute, the said R hath forfeited to the said plaintiff, the sum equal at

least to three times the price for which the said plaintiff hath usually sold or licensed to other persons the use of the said machine ; which price the said plaintiff avers, hath been and is &c. ; and an action hath accrued to the said plaintiff, to demand of the said A, a sum in damages, equal at least to \$—, that sum being equal to three times the price of the said machine as aforesaid ; yet the said R, though requested, hath never paid the said sum, &c. W. GORDON.

Another.

For that whereas, on &c., by certain letters patent, made out in the name of the United States, bearing teste by the President of the U. S., and in court to be produced, there was granted to the plaintiff, his heirs, administrators, and assigns, for the term of fourteen years from the said — day of &c., the full and exclusive right of making, constructing, using and vending to others to be used, a new and useful improvement in the mode of shearing woollen and other cloths, not known or used before the plaintiff's application for said letters patent ; and the plaintiff says, that, pursuant to the act of the U. S., entitled "an act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose," before receiving his said patent, he made oath, that he did verily believe that he was the true inventor or discoverer of the improvement aforesaid, and did deliver a written description of his said invention, and the manner of using the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art, of which it is a branch, to make and use the same ; and in said specification did fully explain the principles of the machine by which said improvement was to be used, and the several modes in which he had contemplated the principle or character, by which it may be distinguished from all other inventions, and accompanied the same with drawings and written references ; which description, signed by himself, and attested by two witnesses, was filed in the office of the Secretary of State, as by a certified copy thereof, annexed to said letters patent appears ; yet the said D, well knowing the premises, but contriving and fraudulently intending to hurt and prejudice the plaintiff, and to deprive him of the profit and privilege of the said exclusive right of making, constructing, using, and vending to others to be used, the said improvement, and invention vested in him by

the said letters patent, *viz.* on the — day of &c., and at divers other days and times between that day and the day of the purchase of this writ, at &c. aforesaid, without the consent of the plaintiff, in writing or otherwise, first had and obtained in that behalf, did unlawfully devise, make, and use said invention or improvement of the plaintiff, and thereby prevented the plaintiff from having and enjoying the whole profit and benefit thereof, and deprived him of great gain and advantage, which would have arisen therefrom, contrary to the form of the act aforesaid; whereby the plaintiff says, that an action accrues to him to have and recover, pursuant to the act aforesaid, of the said D, \$—, being three times the price for which the plaintiff has usually sold or licensed to others, the use of said invention; yet the said D, though often requested, hath never paid said sum to the plaintiff, but neglects it. *Kellogg v. Morse, Circuit Court, Oct. 1799.*

NOTE. If a person, on being privately informed of a person's invention, fraudulently obtain a patent for it, the person injured may have an action on the case for it. See *Smith v. Decker*, 3 Bos. & Pul. 630. Dane's Abr. ch. 61, art. 3.

For not grinding corn at plaintiff's mill which the defendant is bound to grind.

For that whereas the said plaintiff, on &c., and long before, was and continually from thence hitherto hath been, still is, *lawfully possessed*, of and in a certain water corn-mill, with the appurtenances, situate, standing and being in &c., called &c.; and the said plaintiff, by reason of his possession thereof, *for all the time aforesaid*,* of right had and still of right ought to have, toll of corn and grain ground in said mill; and whereas also the said D, for all the time aforesaid hath been, and still is possessed of and in a certain messuage or dwellinghouse, with the appurtenances situate, standing, and being in &c. aforesaid, in which said messuage or dwellinghouse, the said D, during all the time aforesaid, hath inhabited and dwelt, and, by reason thereof, for all the time aforesaid, *ought* to have ground, and still of right *ought* to grind at the said mill, all his corn and grain, after the grinding thereof, used and spent in the said messuage or dwellinghouse, and to pay to the said plaintiff for the

* See 1 Lut. 119, and *infra* Note 2.

grinding thereof, a reasonable toll,* yet the said D well knowing the premises, but contriving, and fraudulently intending to deprive the plaintiff of the profits which would have accrued to him, for the grinding of the corn and grain of the said D, by him, after grinding, used and spent in his said messuage or dwellinghouse, on &c., and on divers other days and times, between that day and the day of the commencement of this suit, at &c., did withdraw his grist from the said mill of the plaintiff, and did grind a large quantity of corn and grain, to wit, one hundred bushels of corn, and one hundred bushels of grain, by him after grinding thereof in his said messuage or dwellinghouse, within that time, used and spent, in and at another mill, than the said mill of the said plaintiff; whereby the said plaintiff hath wholly lost the toll of said corn and grain,† &c. See 2 *Saund.* 113, note (1); 8 *Went.* 523, 524.

8. *Trover.*

1. *Of the nature of the action of Trover.*

Trover is a species of action on the case. It is a substitute for the action of Detinue, now nearly obsolete. It has an advantage over Detinue, because in Trover, the defendant is not permitted to wage his law, as in Detinue he may, and besides does not recover specific articles, as in Detinue, but goes for damages for the conversion of them.

Where the plaintiff is desirous of recovering specific articles, Detinue and replevin are the proper forms of action.

* Or if the case be that all the inhabitants of a manor are bound to grind at the plaintiff's mill, then after alleging the plaintiff's possession of the mill and his right to toll as above, it may be stated in this way, "and that during all the time aforesaid, all the tenants, inhabitants, and residents, within the manor of S, ought to have ground, and still ought to grind, all their corn, grain, &c. (as the case may be,) which by them, or any of them, had been used or spent, ground within the manor at the plaintiff's mill, and to have paid and yielded, and to pay and yield to the said plaintiff for the grinding thereof a certain reasonable toll; and that the said D is a tenant, inhabitant and resident, within the said manor;" and then assign the breach. 2 *Saund.* 118, note (1); *Willes' Rep.* 657. (*MSS.*)

† It is now held sufficient to declare on the *possession* of the plaintiff, and to allege the obligation of the defendant, generally, as in the above precedent, without shewing a title, &c. But formerly the plaintiff was obliged to show his estate and seizin, and to show how the obligation of the defendant arose; whether by prescription, grant or custom. And so are the old precedents. See 2 *Saund.* 112, *Coryton v. Litheby*; 1 *Mod. Ent.* 181; *Bro. Red.* 63; *Herne*, 85; *Willes*, 654; 3 *T. R.* 761, *Rider v. Smith*.

And where the plaintiff declared, that he was, such a day *and continually after*, possessed of the messuage, to which he claimed a way, and also of the way to it; and it was objected, that he complained of a disturbance in the way, which was a contradiction to what was before alleged of his possession of it; the court held the objection nought. *Blockly v. Slater*, 1 *Lut.* 119. (*MSS.*)

Trover differs from Trespass, for taking and carrying away goods, in this, that Trespass is grounded on an unlawful taking by the defendant; but trover admits, that the defendant came lawfully into possession of the goods, but has *wrongfully converted* them to his own use. As a convenient and easy manner of admitting the defendant's lawful possession, the declaration usually states that the goods came to the defendant's hands *by finding*; and whether this be true or not, is wholly immaterial, if the defendant has converted the goods to his own use, which is the *gist* of the action; and even if the defendant committed a trespass in taking the goods, the plaintiff may waive the trespass and maintain Trover for the conversion of them.

Trover therefore in general, may be maintained against any one who having lawfully or unlawfully come to the possession of the plaintiff's goods, converts them to his own use without right; and a demand by the owner, and a refusal to deliver by the person in possession, unexplained and without a sufficient excuse, will be considered a sufficient proof of conversion.

As, if the landlord of an inn detains a traveler's horse, after his keeping is paid or tendered, and without cause.

If a bailee of goods, to keep, detains them when demanded. Cro. Eliz. 781.

If a pawnee detains a pledge after tender of the debt, &c. 1 Rol. 60.

But if A loses goods and B finds them, and A makes a demand, B may lawfully retain the goods till he can ascertain the true owner. 1 Esp. N. P. C. 83; 2 Bul. 312.

But if B makes use of, or misuses the things found, it is a conversion, and Trover may be maintained by the owner. Cro. Eliz. 219; 2 Salk. 655.

If a testator gives a specific legacy, as a watch, or a particular horse, the legatee can maintain Trover for it, against any one, who converts it immediately after the testator's death. See Dane's Abr. chap. 77, art. 6.

In Massachusetts it is supposed in such case, after probate of the will, the proper course for the legatee is to demand it of the executor, and, if it is detained, he may maintain Trover for it, without waiting to ascertain whether the estate is solvent or insolvent. But, if the article is delivered to the legatee, and the estate afterwards turns out to be insolvent, he will be liable to be compelled to return it, or the value, to the executor. And therefore on such demand made by the legatee, it seems that the executor may demand security from the legatee to restore the specific article, in case it should be wanted to satisfy demands against the estate. See Revised Statutes of Mass. ch. 66, sections 15 and 16, and chap. 62, sect. 27.

2. For what things Trover lies.

Trover lies for any species of goods and chattels, as for a horse, a ship, a dog; for money in a bag or chest, so as to be identified; so also for money numbered, though not in a chest; as for a hundred dollars counted out and lying in a pile on a table; for the identical pieces of money are not recovered back in this action (as in Detinue,) but damages in lieu of them, and therefore there is no need of the same certainty as in Detinue and Replevin.

It lies for a chose in action, as a bond, note, deed, bankbill, ticket, or mortgage; so also for coins, medals, plants in boxes, &c.; for animals, valuable as merchandise, as parrots, whether reclaimed or not; for animals *feræ naturæ*, if reclaimed; otherwise not. Thus, it seems, Trover might be maintained for a bear chained or secured in any manner, but if the bear should escape and run wild, and should afterwards be killed or retaken by a third person, it seems questionable whether Trover could be maintained, either for the bear or his carcass, though perhaps of considerable value.

Trover lies for goods tortiously seized by revenue officers. 3 Wils. 146.

Where Trover cannot be maintained.

Trover does not lie without a conversion; as if goods found, are taken from the finder by violence, or upon an execution, by a third person. See 2 Mod. 243.

So, if goods delivered to a carrier are stolen, Trover does not lie against the carrier, but only a special action on the case. 2 Bur. 2825. But if a carrier converts the goods to his own use, trover lies.

It will not lie against one who acquires property by gift or sale from the plaintiff, for the property is changed. Cowp. 814; Doug. 24.

If a man find a bankbill, and deliver it to A for a valuable consideration, and without notice, the loser cannot maintain Trover against A, though he might against the finder. 1 Salk. 284, 126. But if A takes it without giving a valuable consideration, or if he pays a valuable consideration for it, with notice, Trover lies. 1 Salk. 284, 126.

3. Who may maintain Trover, and against whom it may be maintained, &c.

An administrator may maintain Trover for goods taken from the possession of the intestate, or after his decease, and before administration granted. Style, 341; 1 Str. 60. So of an executor.

Baron and feme may join in this action for goods of the wife, taken before marriage though the conversion be after. 2 Lev. 107.

A deputy-sheriff, or his executor, may maintain Trover for property attached by the deputy sheriff, and converted during his life by a stranger. 1 Pick. 389.

Generally every one who has a property in the goods converted, may maintain Trover for them, and even if he has not the possession; as if A bails goods to B, to be delivered over to C, C may maintain Trover against B. 1 Buls. 68.

For a temporary conversion of goods, though they are restored before the commencement of an action, Trover may be maintained, and damages will be recovered for the detention merely. But as the law on this particular point does not seem clearly settled, particularly where the only evidence of conversion is a demand and refusal, perhaps it would be best to join a special count in Case with that in Trover. See 1 Rol. 5; C. 40.

A special property is sufficient; as a common carrier, who loses goods, may maintain trover for them.

It is said in 2 Esp. C. 465, that to maintain Trover, the plaintiff must

either be in actual possession, or have a right to immediate possession, at the time of the conversion.

And even a naked possession is sufficient against any one, who has no right even to that, as by the finder of a jewel. So where a man, under pretence of right, cuts down wood, though he has no legal right to the wood, he may maintain Trover against a stranger for taking it away. See 3 Wils. 336.

A lessor may maintain Trover for timber cut down by the lessee. See Cro. Car. 242. 2 Buls. 135, *contra*.

Where a servant converts goods to his master's use, with or without his authority, Trover may be maintained against the master. 1 Wils. 328.

So, where a servant to a pawnbroker, received a pawn for his master and lost it, it was held, Trover might be maintained against the master. Salk. 141.

But one tenant in common cannot maintain Trover against another, even if a stranger be joined with the defendant, 1 Term Rep. 658, because one has as good right to the possession as the other. But if one destroys the common property, Trover may be maintained against him by the other.

In *Weld v. Oliver*, 21 Pick. 559, it was held, if one tenant in common of personal property, sells it, the sale will amount to a conversion, and the other tenant in common may maintain Trover for his undivided part, against his co-tenant.

If the purchaser sells the property again, Trover may be maintained against him, for the conversion of the undivided moiety of the party injured. *Ibid*. In that case the measure of damages, will be the value of the property at the time, when such purchaser *sells*, and not the value, when he bought. *Ibid*.

If such tenant in common, on a sale by his co-tenant, and a re-sale by the purchaser, presents a bill to the purchaser for one half of the price, at which he has re-sold the property, it will not be a waiver of his right to bring Trover against him. *Ibid*.

Trover may be maintained against husband and wife, supposing the conversion (which is a tort) done by both, but the declaration should allege, that they converted the goods "to the husband's use," since "to their use," is bad. Yelv. 165; 2 Cro. 661.

If goods come successively to the hands of several, Trover may be maintained against any one of them, who converts the goods to his own use.

It has been said, defendant cannot justify detaining goods till money laid out on them is paid, but the money may be deducted from the damages. But this is absurd. For if the defendant was warranted in laying out the money on the goods, he would have a lien on them for the amount, and so there would be no cause of action against him, until the amount was tendered. On the other hand, if he laid out the money on the goods without any authority, it would be a payment in his own wrong, and consequently, it ought not to be deducted from the damages, any more than if there had been a tender and refusal.

If money (which has no ear mark) is stolen from A and paid over to B, Trover cannot be maintained against B. 1 Salk. 284.

But there can be no doubt, if a bag of money were stolen from A and delivered to B, without notice and without consideration, Trover

might be maintained for it after demand and refusal, as well as for any thing else.

An indorsee of a bill of lading, or any consignee of goods, may maintain trover for them before they have come into possession, as the property is transferred by the indorsement or consignment. However, in particular cases, the consignor may stop the goods *in transitu*, before they come to the consignee's hands. 1 T. R. 205, 745; 2 T. R. 63.

In general, one tenant in common, or joint tenant, or a partner, cannot maintain Trover against his cotenant, or copartner; for the possession of one is the possession of all; and though, where there are two tenants in common of land, one in fee, and the other for years, and the tenant in fee has cut down trees, which the tenant for years has converted to his own use, the tenant in fee may maintain Trover against the tenant for years for the trees, it is because, that as respects the trees, they are not tenants in common, for the trees following the inheritance, belong wholly to the tenant in fee. See Bul. N. P. 35; 4 Camp. 472.

But if one tenant in common destroys the thing held in common, it is a conversion in law to his own use, and the other may maintain Trover. Bul. N. P. 34.

Trover lies against the master for goods *delivered to a servant in the course of his employment*; otherwise, not; for if otherwise, *quoad hoc*, he is not a servant to his master. 1 Ld. Raym. 738; Salk. 141.

If A sells goods, and contracts to deliver them at a certain time to B, but does not deliver them at that time, still B cannot maintain Trover until after demand and refusal. 4 Esp. C. 156.

4. What amounts to a conversion.

It seems, wherever A is lawfully in possession of goods of B, which he is bound to deliver to B, on request, such demand and A's refusal, are sufficient evidence of conversion, for the jury to find a verdict in plaintiff's favor; though, if the facts are found specially by a jury, the court are not warranted in determining it to be a conversion. And therefore, evidence of a demand and refusal are always in such cases, considered sufficient to maintain this action. But a bare non-delivery, though accompanied with false pretences and excuses, is not such a refusal. 4 Esp. C. 157.

The use of a thing found, it is said, will amount to a conversion, as riding a horse, milking a cow, &c. But this must depend upon the circumstances in each particular case. If the thing found is consumed by using it, as a barrel of flour, it would obviously be a conversion. But if a man should take up a stray horse, and without knowing who was the owner, should ride him every day, till he received notice, and then delivered him over to the owner, it seems unreasonable that he should be liable for the temporary conversion of him, in an action of Trover, in which he could have no set-off against the horse's keeping. Thus A takes up B's horse as an estray, keeps it for a month, and uses it every day, without notice that B is the owner, then the horse dies; B discovers that A has used his horse, shall B have an action of

Trover against A, and recover in this form of action, the value of the horse's labor, when B can have no remedy whatever for the horse's keeping, the horse being dead, upon which B would have had a lien, if alive? It seems unreasonable. But if B is driven to his *quantum valebat* for the labor of the horse, there is nothing unreasonable that A should deduct from it (having a lien on the horse and consequently on his labor) the amount of charges for his keeping; though, for want of a promise express or implied, he might not be able to recover it in an action of Assumpsit. The same remark applies to milking a cow, which, however, is acknowledged not to amount to a conversion; since it is for the preservation of the beast. But even here it is reasonable, that the owner of the cow should be entitled to the value of the milk, in an action of Assumpsit, deducting the charges of the keeping the cow. *Sed quare.*

To waste, consume, spoil, or misuse any thing found, bailed, entrusted, or that one is in possession of, and which belongs to another, is a conversion. As to throw paper found, into water; for a carrier to break open a box, and take goods to himself; to take out part of the liquor from a vessel and fill it up with water. This last is a conversion of the whole liquor.

But suffering things found, bailed, &c. to spoil, or be lost, through mere *negligence*, is not a conversion, and Trover is not the remedy, but a special action on the case (if any.) But in New York it has been decided, if A admits that he has had the goods of the plaintiff, but has lost them, this confession will be sufficient evidence of conversion. 1 Johns. C. 406. *Quare.*

And if A, having a right to remove goods, does so; and, not being replaced they are lost, this is no conversion, and Trover for them cannot be maintained against A.

Where the taking of the plaintiff's goods is tortious, it is not necessary to prove an actual conversion; but Trover may be maintained, though it is evident, there has been no conversion to the defendant's use; as where a servant takes goods and converts them to his master's use; in which case, Trover may be maintained against the servant; and, in the case of a tortious seizure of plaintiff's goods by revenue officers, who are liable to this action, though the goods are not converted to their own use. 3 Wils. 146; 2 Str. 943; 2 Wils. 328.

If a carrier should carry goods to a wrong person by mistake, Trover may be maintained against the carrier; for it is a conversion. Or Trover might be maintained against such stranger, after a demand and refusal, either by the carrier, or the proper person. 2 B. & A. 702; Peake's N. P. C. 49. But in the case of the carrier, it would be safer to join one count specially on the case, with the count in Trover. *A fortiori*, if A, contrary to orders, delivers T's goods to C, it is such a conversion in A, as will support Trover against him by T. 4 T. R. 260.

Where goods are detained by virtue of a lien on them, a demand and refusal will not be such a conversion as will maintain Trover. Otherwise, if there be no lien. 4 Bur. 2221.

It is held, if H lends his oxen to P, to plough his land, and C drives them away, P may maintain Trover for them. See in the notes to *Wilbraham v. Snow*, 2 Saund. 47, a.

Quare of the amount of damages to be recovered by P in such

case. If the value of the oxen is recovered by P, the oxen become the property of C. But a judgment in an action between P and C cannot bind H, who will still have an action of Trover against C for the oxen, for aught that appears; or, shall he have an action against P for the value of the oxen? But, in such case, it seems to be the opinion of some, that the recovery by P, the bailee, will bind H. See Dane's Abr. ch. 87, art. 8, sec. 8.

5. *Of the declaration in Trover.*

The declaration should set out property or possession of the goods in the plaintiff, alleging a value, together with a time and place of conversion. It may allege that the goods came to the defendant's hands *by finding*, or came to his hands generally, without more. If the action is brought by an administrator *in that capacity*, the property may be alleged in the testator, whether the conversion was before or after his death, if before administration granted; but if any one takes the property belonging to the estate, *after administration*, the administrator may declare on his own possession. See 1 T. R. 480.

6. *Of the amount of damages.*

In Trover, the value of the goods at the time of conversion, with interest to the time of obtaining judgment, is the measure of damages.

In Massachusetts, the court adhere to this rule, even in cases, where the plaintiff has bought an article at a stipulated price, and the defendant refuses to deliver it on demand, and afterwards sells it at a great advance, after action brought, but before trial. 4 Pick. 466. This appears to be impolitic and inequitable. Impolitic, because it holds out an inducement to practise dishonesty, where there is a prospect, that an article sold, but not delivered, will rise in value, beyond the price paid for it, and interest; and inequitable, because the plaintiff is deprived of the advantage of a rise in the market, which among merchants is one of the principal inducements to purchase; and the defendant derives an advantage from his own fraudulent conduct; since, while the article remains in his possession, he has the option, either to deliver up the article, if the market falls, at the price agreed, or keep it, if the market rises, and pay back merely the price and interest. This is giving him an unfair advantage. The fair principle would be, that the defendant should pay the purchase money and interest, at least, and if the plaintiff could show, that the defendant had made more of it before action brought, that the damages should be increased accordingly.

If the property is restored, it goes in mitigation of damages. If it is recovered, but the plaintiff has been at any expense in recovering it, as by offering a reward, &c. the amount of those expenses must be deducted from the value of the article, when returned. See *Greenfield Bank v. Leavitt*, 17 Pick. 1.

DECLARATIONS IN TROVER.

For a sloop and her cargo, according to a schedule annexed.

For that, at &c., on &c., the plaintiff was possessed of a

certain sloop, called the S, burthened — tons, and of the value of \$—, with her cargo, being the goods and chattels contained in the schedule hereto annexed, of the several values thereto annexed, as of his own goods and chattels, and being so possessed, thereafterwards, on the same day, lost the same, and the same thereafterwards, on the same day, came into the hands and possession of the said D, E, and F, by finding; yet the said D, E, and F, though they well knew the same to belong to said plaintiff, yet intending to injure and defraud him thereof, refused to deliver the same to said plaintiff, though thereto requested, but thereafterwards, on the same day, converted the same to the use of the said D, E, and F, all which is to the damage, &c. *Norwood v. Foster, Essex, 1785.* T. PARSONS.

For a chest and goods.

For that the plaintiff, on &c., at &c., was possessed of a chest and several goods and clothes therein contained, in the schedule hereto annexed, particularly mentioned, all of the value of \$—; and being so thereof possessed, thereafterwards, on the same day, lost the same chest and goods, which thereafterwards, on the same day, came into the hands and possession of the said D, by finding; yet the said D, well knowing the same to be the proper goods and chattels of the plaintiff, and of right to appertain to him, though requested, hath not delivered the same to the plaintiff, but thereafterwards, on the same day, converted the same to his own use; to the damage, &c.

For thirty-five hogsheads of sugar.

For that the plaintiff, on &c., at &c., was possessed of thirty-five hogsheads of sugar marked $\frac{WC}{D}$, of the value of \$5000, as of his own sugar; and being so possessed thereof, the plaintiff thereafterwards, on the same day, casually lost the same sugar, which same sugar thereafterwards, on the same day, came into the possession of the said D by delivery; yet the said D, well knowing the said sugar to be the property of the plaintiff, but intending to defraud and injure him in this behalf, has not returned said sugar to the plaintiff, though requested, but thereafterwards, to wit, on the same day, converted the same to his, the said D's own use. *Bartlett v. Chase, S. J. C. Essex, 1802.* T. PARSONS.

For a piece of cloth, by a person under guardianship.

For that the said plaintiff, on &c., at &c., was possessed of a certain piece of drab cloth, of the value of \$—, as of his own proper goods and chattels, and afterwards casually lost the same; and the same afterwards, on &c., at &c., came by finding, into the hands and possession of the said D, who well knowing the same goods and chattels to belong to the said plaintiff, and that he was under guardianship as aforesaid, but intending to defraud him, and injure his said guardian, there, on &c., refused to deliver the said cloth to the said plaintiff, or his said guardian, though thereto lawfully requested; and thereafterwards, on the same day, converted the same, to his, the said D's own use.

N. DANE.

By executor for goods belonging to the deceased.

For that whereas the said A, at &c., on &c., was possessed of the goods and articles, mentioned in the annexed schedule, of the value of \$—, and which were of the goods of the said A, at the time of his decease, as of his own goods and chattels, and thereafterwards, on the same day, casually lost the same, which thereafterwards, on the same day, came to the hands of the said D, by finding, who well knew the same to have been the property of the said A, at the time of his decease, and to be the property of the plaintiff, but intending to embezzle the same, and maliciously intending to defraud the said plaintiff thereof, he, the said D, though requested, *viz.* thereafterwards, on &c., refused to deliver the same to the said plaintiff, and then and there wickedly converted the same to his own use; to the damage, &c. *Main, administratrix, v. Boden, Essex, 1798.*

S. SEWALL.

By husband and wife, for a spinning-wheel belonging to wife and converted before marriage.

For that the said A [*the wife,*] on &c., at &c., was possessed of a certain spinning-wheel, of the value of \$—, as of her own proper goods and chattels, and afterwards, on the same day, casually lost the same; and thereafterwards, on the same day, the same wheel came, by finding, to the possession of the said D, who knowing the same to be the property of the said A, never delivered the same to the said A while sole, nor to the said B and A since their intermarriage, though requested, *viz.* on &c., at &c.; but then and

there converted the same to his own use; to the damage of the said B, [*the husband.*]

NOTE. It would be bad to say, to the damage of the said B and A. Salk 114.

By administrators for property belonging to deceased.

For that the said plaintiffs, in their said capacity, at &c., on &c., were possessed of &c., the property of said intestate; and being so thereof possessed, then and there, casually lost the same; and afterwards, there on the same day, the same goods came to the possession of the said D, by finding; yet the said D, well knowing the same to be the goods of the plaintiffs as aforesaid, has not delivered them to the plaintiffs, though on &c., at &c., thereto requested; but thereafterwards, on the same day converted the same to his own use; to the damage of the said plaintiffs, in their said capacity, &c.

NOTE. If Trover were first, and administration afterwards, the plaintiff may declare specially, or lay Trover after the administration. Per Holt. Comb. 304; Mod. Ent. 366; for executor has a constructive possession from the testator's death. 1 T. R. 480.

It seems, Trover does not lie against an executor or administrator with the will annexed, for a conversion by the testator. The distinction, as to what actions survive, is that where damages only for an injury are recoverable, the action will not survive against the executor; but where value is recoverable the action will survive. See *Hambly v. Trott*, Cowp. 371.

Under the Rev. Stat. of Mass. ch. 93, sec. 7, Trover survives for and against an executor or administrator.

For two bonds.

For that the said plaintiff, at &c., on &c., was possessed of divers goods and chattels, to wit, one bond, by which one A was bound and obliged to pay the plaintiff \$— yearly during her life, of one bond, by which one B was bound and obliged to pay the plaintiff the like sum of \$— yearly during her life, and of one other bond, by which one C was bound and obliged to pay the plaintiff the like sum of \$— yearly during her life, of the value of \$—, as of her own proper goods and chattels, and being so thereof possessed, the said plaintiff, thereafterwards, on the same day, casually lost the same, which said goods and chattels thereafterwards, on the same day, came into the possession of the said D, by finding; yet the said D, well knowing the said goods and chattels to be the property of the plaintiff, but contriv-

ing and intending to defraud and injure her in this behalf, has not returned the said goods and chattels to the plaintiff, though requested, but afterwards, to wit, on &c., at &c., converted the same to his own use; to the damage, &c. *Bartlett v. Currier, Essex, 1800.* T. PARSONS.

By an administrator for goods contained in a schedule.

For that the plaintiffs, in their said capacities of administrators as aforesaid, on &c., at &c., were possessed of divers goods and chattels, which in the lifetime of the said A B, and at his decease, belonged to him, and among other things, of the goods and chattels in the schedule hereto annexed, and of the value therein mentioned, as of their own proper goods and chattels as administrators aforesaid; and being so thereof possessed, then and there casually lost the same, and the said D, thereafterwards, on the same day, found the same and knew that truly and of right they belonged to the plaintiffs in their said capacity, but evilly and wickedly contriving and intending to defraud the plaintiffs in their said capacity thereof, though on the same day, and often since requested, would not deliver the same to the plaintiffs, in their said capacity, but afterwards, on the same day, converted the same to his own use, to the hindrance and delay of the said administrators, and to the damage, &c. *Administrators of Hewell v. Desilver.*

J. ADAMS.

COVENANT.

THIS action lies only upon agreements or other instruments under seal. And therefore where a contract under seal is varied by a written agreement not under seal, *Assumpsit* is the proper remedy for a breach of the unsealed contract. *Mill-dam Foundry v. Hovey*, 21 Pick. 417.

It will lie, however, upon an agreement or covenant, in law, or implied in a deed, as well as upon an express one. Covenants *in law*, are such as are implied from the express covenants, or words in the deed, which are necessary to the enjoyment of the express covenants, or to the operation of the deed. Cro. Eliz. 214; 4 Co. 80; 3 Keb. 465; 1 Leo. 122; 1 Saund. 322; 16 East, 352.

This action may be maintained against an executor or administrator, whether named in the covenant or not. Cro. Eliz. 553. And whether the covenant is express or implied, if broken in the lifetime of the

covenantor ; but not on an implied covenant, broken after his death. Dyer, 257, a.

This action may be maintained against an heir, if named ; otherwise not, *as heir* ; but he may be charged as assignee, if the covenant runs with the land. 4 T. R. 75.

So, for a breach in the lifetime of the covenantee, Covenant may be maintained by an executor or administrator, whether named in the covenant or not. 1 Vent. 176.

But for a breach of a covenant that runs with the land, taking place after the death of the covenantee, the heir alone can sue ; and this he may do, whether named in the covenant or not. *Ib.* 2 Lev. 92.

If A in a deed-poll covenants to pay money, &c. to B, who is not a party to the indenture, B may maintain Covenant for the money, &c. See 2 Lev. 71.

So if B is a party but does not execute, he may maintain Covenant against A. Lut. 305.

If there is a breach of covenant in the time of an administrator, Covenant may be maintained, and he must answer out of his own goods. Ld. Raym. 554.

Of actions by and against assigns or assignees.

Assignees of all choses in action, not negotiable, must sue in the name of the promisee, obligee, covenantee, &c. 14 Mass. R. 107. If such covenantee or promisee is dead, the action must be brought in the name of his executor or administrator.

And the covenantee's or promisee's name being merely used for the sake of form, he cannot discontinue the suit, nor release the demand. Nor is his consent necessary to this use of his name ; and the same remark applies to his executor or administrator. See 1 Bin. 423 ; 1 Dal. 139 ; 9 Mass. R. 337 ; 15 Johns. R. 405.

For breach of covenants that run with the land, an assignee, whether he come in by act of law, or by an assignment by act of the assignor, shall maintain Covenant, and will declare in his own name as assignee. And for this purpose, tenant by the curtesy ; the husband of lessee for years who survives ; tenant by statute merchant, &c. are assignees. 5 Co. 17, a.

An assignee of a lessor, who has accepted of rent from the assignee of the lessee, may maintain Covenant against the lessee for rent growing due after the assignment, as well as before.

So an assignee of a reversion, who hath accepted rent from the assignee of the lessee, shall nevertheless have Covenant against the executor of the lessee, and for a breach of covenant happening after the assignment by lessee ; for the covenant runs with the land, and the lessee shall not discharge himself by his own act. Cro. Jac. 521 ; 2 Show. 134.

Covenants *that run with the land*, bind an assignee, though not named. As if lessee covenants to repair the house demised, this covenant shall bind his assignees to repair, though they are not named. 5 Co. 16 ; Cro. Jac. 125 ; 5 Co. 24 ; 2 H. Bl. 183.

Covenants *that do not run with the land*, shall not bind the assignee unless named. As if lessee covenants to build a wall on the land demised, this shall not bind the assignee unless named. *Ib.* But if the covenant mentions the assignee, he shall be bound. *Ib.*

But where the covenant is to do a thing merely collateral, as to build a house on other land of the lessor, the assignee shall not be bound, though expressly named in the deed. *Ib.*

For a breach of covenant, complete before the assignment, an assignee is not liable. Salk. 199; 3 Bur. 1271.

An under-lessee is not liable for a breach of covenants that run with the land. For that purpose, he must be assignee of the whole term. Doug. 174.

Covenants that run with the land, bind whoever is an assignee by act of law. 5 Co. 17, b.

Leasees are liable for breach of covenants after assignment.

Assignees are liable for no breaches of covenants that run with the land, except such as take place after the assignment to them, and before they assign over again. Salk. 81; Doug. 735.

An assignee shall not have an action upon a breach of covenant before his time. Cro. Eliz. 163.

Upon a breach during his estate, he may maintain an action after the determination of it. Owen. 152; Buls. 281.

Of joint and several covenants.

If a covenant be with several, and it appears by the deed that their interest in fact is *joint*, all must join in the declaration, though the covenant is to them and each of them. And so, if the action is against them, and their covenant is joint, all must be sued together. See Willes, 248; 5 Co. 19, b; Salk. 137; 1 Show. 8.

But if the interest of the covenantees be several, and the covenant is with them and each of them, every one may sue separately, in respect of his several interest. 5 Co. 226.

So, if A and B covenant severally, Covenant lies against A for his several breach. Noy. 86.

Where a covenant is joint and several, and the action is brought against one, the breach must be assigned in the neglect of both or all, since, by the performance of any one of them, the covenant is complied with. Str. 553.

If one named in the indenture does not execute, he may be excluded by an averment that he did not execute, or they must all join in the action. Stra. 1146. *Quere.*

Further observations on this action.

In an action by an heir, who sues upon a grant or covenant to his ancestor and his heirs, he must be named *heir*. Otherwise, if he sues in his own right, though he comes to the right by descent. And he must show how heir. 1 Salk. 355. *Quere.*

In an action of Covenant for breach of warranty of lands, brought against an heir and devisee, they should be jointly sued. *Quere.* See 9 Mass. R. 395.

Where covenants are secured by a penalty, which is a sum of money in gross, Debt or Covenant may be brought; but the penalty is not to be considered as liquidated damages. 3 Bos. & Pul. 630; 7 Wheat. 13; See *Searns v. Barrett*, 1 Pick. 443.

DECLARATIONS IN COVENANT.

1. *On covenants in conveyances of lands, &c.*

On a breach of covenant against incumbrances in warranty deed.—
Grantee v. Grantor.— The premises being mortgaged.— Quare of
the words in italics.

In a plea of covenant broken, for that the said T, on &c. at &c., by his deed of that date, duly executed, acknowledged, recorded, and in court to be produced, in consideration of the sum of \$—, paid him by the plaintiff, conveyed unto the plaintiff a messuage &c. [*describe the premises,*] to hold to him and his heirs; and the said T did therein, *among other things*, covenant with the plaintiff, that the said tenements were then free of all incumbrances. Now the plaintiff in fact says, that at the time of making and executing the said deed, the said tenements were not free of all incumbrances; but the said T, before that time, *viz.* on &c., by his deed of that date duly acknowledged, executed, and registered, had mortgaged the said tenements to one C C for securing the payment of \$100, with lawful interest to the said C C by the — day of &c., which sum, with the interest thereof, is still unpaid; and the tenements aforesaid are still chargeable with the payment thereof; and so the said T, his covenant aforesaid hath not kept, but hath broken the same.

F. DANA.

NOTE. If the breach of the covenants in the deed consists in the fact "that the defendant was not seized," and had no right or authority to convey, the breach may be assigned by simply negating the covenants. But, with regard to the covenants of *quiet enjoyment*, and that *the premises are free from all incumbrances*, and that of the covenant *to warrant and defend*, it is necessary to assign the breach, by showing the interruption or incumbrance complained of, or showing an ouster by an elder title. See *Marston v. Hobbs*, 2 Mass. R. 433.

The covenant of warranty can only be broken by an ouster or eviction by elder title. *Twambly v. Henley*, 4 Mass. R. 441.

The grantee is not obliged to contend at law against an elder title, in order to recover on this covenant. But if he should incur expenses in the defence of his title, he will be entitled to recover those expenses against the warrantor in addition to other damages. *Sumner v. Williams*, 6 Mass. R. 162.

If the plaintiff, in an action for breach of a covenant against incumbrances, should extinguish an incumbrance after action brought, instead of merely nominal damages, he will recover the amount paid to extinguish the incumbrance. *Brooks v. Moody*, 20 Pick. 474.

On a breach of the covenants in a common warranty deed.— Grantee v. Administrator of grantor. The granted premises were under attachment at the execution of the deed.

For that the said S [the intestate,] at &c., on &c., being then living, by his deed of that date, duly executed, ac-

knowledge, and registered, and here in court to be produced, in consideration of \$100 paid him by the plaintiff, conveyed to him, his heirs and assigns forever, two acres of land, situated in &c., bounded &c., with the appurtenances. And the said S did therein and thereby, among other things, covenant, grant and engage for himself, his heirs, executors, and administrators, to and with the plaintiff, his heirs and assigns, that at and before the ensealing and delivery thereof, he was lawfully seized in fee of the said granted premises; that they were free of all incumbrances whatever, and that he had good right and lawful authority to sell and convey the same as aforesaid to the plaintiff, to hold the same as a good estate in fee simple; and that he, the said S, his heirs, executors and administrators, would warrant and defend the same to the plaintiff, his heirs and assigns forever, against the lawful claims and demands of all persons whatever. And the said plaintiff avers, that when the said S made and executed the said deed as aforesaid, he was not lawfully seized of the said granted premises in fee; that they were not free of all incumbrances whatever; and that he had not good right and lawful authority to sell and convey the same as aforesaid; but that the same were then under attachment made in due form of law, at the suit of A A, brought by him to recover a just debt due to him from the said S, and have ever since remained under the said attachment. And so the plaintiff says, the said S, his covenant aforesaid, hath not kept, but hath broken the same, &c.

N. DANE.

On a breach of covenants in a common warranty deed. — Grantee v. Grantor. — General breach.

For that the said D, at &c., on &c., by his deed of that date, duly executed, acknowledged, and recorded, and in court to be produced, in consideration of \$100, bargained and sold to the plaintiff, a certain tract of meadow land, situate &c., bounded &c., to have and to hold the same to the plaintiff, and his heirs and assigns forever. And the said D, by the same deed, covenanted to and with the plaintiff, that at the time of the ensealing of the deed aforesaid, he, the said D, was seized in fee of the aforesaid lands, and had in himself good right and lawful authority to sell and convey the same in manner as aforesaid, and that the plaintiff from thenceforward, might, by force of that deed, lawfully possess and enjoy the same, free of all incumbrances. Now the plaintiff in fact says, that the said D, at the time of

ensealing the deed aforesaid, was not seized in fee of the aforesaid lands; nor had he good right or lawful authority to sell and convey the same in manner aforesaid; nor could the plaintiff, by force of said deed, lawfully *possess and enjoy the same, free of all incumbrances, according to the said D's covenant aforesaid.* And so the said D has broken his covenant aforesaid, to the damage, &c.

TROWBRIDGE.

NOTE. This breach of the covenant for quiet enjoyment and against incumbrances, is insufficiently assigned. The incumbrance or disturbance should be specially set forth.

Against executor on a breach of covenants in a deed made by testator. — By grantee. — For want of title, with special damages.

For that the said A A, [testator,] in his lifetime, to wit, on &c., at &c., made, sealed, and delivered to the plaintiff, his deed-poll of that date, duly acknowledged, recorded, and in court to be produced; in which, among other things, it is witnessed, that the said A A, in consideration of \$100, then paid to him by the plaintiff, did give, grant, bargain, sell, convey, and confirm unto the plaintiff and his heirs and assigns forever, the sundry tracts of land hereafter mentioned, originally granted by the inhabitants of the town of Brookfield, in our county of Worcester, to sundry persons respectively, and laid out to them accordingly, and which, when granted and laid out as aforesaid, lay in the southwest corner of said township of B, and at the time of making said deed, were, and ever since have been, within and part of the town of Weston, in our said county; to wit, one parcel of land containing &c. laid out as aforesaid to B B on the — day of &c.; another parcel &c., &c.; for the more particular boundaries of which said tracts of land, the said A A referred to the original records of the surveys thereof, in the records of the said town of B; to have and to hold the same with the appurtenances thereof to the plaintiff, his heirs and assigns, to his and their only proper benefit, use, and behoof, forever. And the said A A, by the said deed, did for himself, his heirs, executors, and administrators, covenant, promise, and grant to and with the plaintiff, that before and until the ensealing of the same deed, he, the said A A, was the true, proper, sole, and lawful owner and possessor of the said granted premises, with the appurtenances thereof; and that he had in himself, good right, full power, and lawful authority to give, grant, &c., the same, to hold, as aforesaid, and *that* free and clear, and freely and clearly ex-

onerated, discharged, and acquitted, of and from all other gifts, grants, bargains, and incumbrances whatever; and that he, the said A A, his heirs, executors, and administrators, would warrant, secure, and defend the same to the plaintiff, against the lawful claims and demands of all other persons whatever. And the said plaintiff says, that at the time of the ensembling said deed, or at any other time, the said A A was not the true, sole, proper, and lawful owner and possessor of said granted premises, or any part thereof; and that he, the said A A, never had in himself any power to give, grant, &c., the same, or any part thereof to him as aforesaid; and that the same was not free and clear, or freely and clearly discharged and acquitted from other gifts, grants and incumbrances; but that the title and freehold in the premises, at the time of making, sealing, and delivering said deed, was in other persons, than in the said A A, by priority of right; and that after his death, and the death of C C, late of &c. deceased, who in his lifetime was executor with the said D, of the last will and testament of the said A A, one E E of &c., entered upon the aforesaid tracts of land, pretending himself to have the rightful possession thereof, and claiming the same, as his estate, and cut down and carried away the timber and wood then growing thereon, and destroyed the plaintiff's fence erected thereon; of which the said D was well knowing; yet, though requested, he did not defend the same to the plaintiff, but suffered the same E E to continue the possession thereof, and the plaintiff thereby became obliged to and did then and there expend large sums of money in prosecuting and pursuing sundry actions for maintaining his then supposed rightful possession of the said tracts of land, and to recover a recompense for the cutting down and carrying away said wood and timber, and for destroying the fence aforesaid; but for want of a good title as aforesaid, could not maintain the same, but finally lost said tract and acres of land, with all his trouble and expense aforesaid, amounting to \$—, by reason of the said A A's having no title thereto; and that he cannot hold any part of the above granted premises, for the like reason, to wit, that the said A A had not any right or title thereto, as aforesaid. And so the said A A broke his covenant; nor did the said B and D, during the life of the said B, and after the death of the said A A, keep and perform it; nor hath the said D kept and performed said covenant, since said B's death; and the breach &c. is to the damage, &c.

WORTHINGTON.

Against executors for breach of covenant in a warranty deed. — By grantee, the premises being subject to dower.

For that the said B B, in his lifetime, on &c., at &c., by his deed of that date, duly executed, acknowledged, recorded, and in court to be produced, for \$100 paid him by the plaintiff, bargained and sold to him [*insert the premises,*] to hold to him and his heirs; and thereby covenanted to warrant and defend the same against the lawful claims of all persons, and that the plaintiff might hold and enjoy the same forever. And the plaintiff avers, that he entered thereinto accordingly, but could not hold the same free of incumbrances; neither did the said B B, in his lifetime, nor the said executors, or either of them, since his death, warrant or defend the bargained premises, according to his covenant aforesaid, though severally requested to do it; but one C C, then and ever since, being lawfully entitled to dower therein, recovered judgment therefor, and \$10 costs upon her suit, against the plaintiff, at our court of &c., held at &c. on &c., and by force of our writ of execution, issued thereon, she since entered into the premises, and holds one third part thereof, legally assigned to her for her dower; so that the said testator, in his lifetime, broke his covenant; and his executors, or either of them, since his death, hath never performed the same.

W. PYNCHON.

By assignee of grantee on a covenant in a deed of real estate, made by grantor. Eviction by title paramount; special damages, &c.

For that the said E, on &c., at &c., by his deed of that date, duly executed, acknowledged and registered, an attested copy whereof is here in court to be produced, for the sum of \$100, bargained and sold to one H H, of &c., sundry parcels of land, to wit, [*describe the premises,*] to hold to him, the said H H and his heirs and assigns forever; therein among other things, covenanting with the said H H, his heirs and assigns, that he, the said E, was lawfully seized in fee of, and had good right to sell and convey the said pieces or parcels of land and buildings to the said H H, to hold in manner as aforesaid, and that he, the said E, would warrant and defend the same to the said H H, his heirs and assigns, against the lawful claims of all persons whatever. And the said H H, thereafterwards, on the same day and year last mentioned, entered into the said parcels of land. And afterwards, on &c., he, the said H H, being in the actual possession thereof, by his deed of that date, duly executed, acknowledged, recorded, and in court to be produc-

ed, for the sum of \$—, bargained and sold the aforementioned parcels of land and buildings to the plaintiff, to hold to him, his heirs and assigns forever; and the plaintiff saith, that he thereafterwards, on the same day, entered into the said parcels of land and buildings, and became possessed thereof, and ought to hold and enjoy the same, as a lawful estate in fee simple, according to the aforesaid covenants of said E; but the said E hath not kept his covenants aforesaid, but hath broken the same; for that he was not lawfully seized in fee, of said parcels of land and buildings, had not good right to sell and convey the same to the said H H, to hold to him, his heirs and assigns forever as aforesaid, and that he hath not, nor hath the said H H warranted and defended the same to the plaintiff, although severally requested so to do; but C C, wife of F F, now deceased, and N N, wife of G G, now deceased, being the rightful owners of one hundred acres, part and parcel of the aforementioned lands, sold and conveyed by said E, to said H H, and by him to the plaintiff, bounded, &c., and of the value of \$—, they, the said F and C, and the said G and N, recovered judgment for their seizin and possession of said one hundred acres of land, and for \$20 costs, against the plaintiff, at our S. J. Court, held at &c., on &c.; and by force of our writ of execution issued thereon, they, the said F and C, and G and N, afterwards entered into said one hundred acres and legally held the same during the lives of said F and G; and the said C and N now legally hold the same in fee. And so the said E hath not kept his covenants aforesaid, but hath broken them. *Co. Litt.* 384.

W. PRESCOTT.

For breach of covenant in warranty deed. — By devisee of grantee against administrators of grantor.

In a plea of the covenant broken; for that the said B B in his lifetime, to wit, on &c., at &c., by his deed of that date, duly executed, acknowledged, and recorded, and in court to be produced, for the sum of &c., bargained and sold to one A A one hundred acres of land, lying &c. with the appurtenances, to hold to him, his heirs and assigns forever; therein covenanting, that he, the said B B, was lawfully seized of said land, and that it was free of all incumbrances whatever, and that the said A A, his heirs and assigns, should enjoy the said land forever. And afterwards the said A A, being seized of the same one hundred acres of land, on &c., at &c., made his last will and testament,

duly proved, approved, and allowed, since the decease of said A A, and therein devised the said one hundred acres of land to the plaintiff in fee; and thereafterwards, on the same day, died so seized of the same; and the plaintiff thereupon entered into the same, and ought to enjoy the same free from all incumbrances, as a lawful estate, in fee simple, according to the covenant aforesaid; yet the said B B did not keep his covenant aforesaid, but broke the same; for that he was not lawfully seized of the said land; nor was the said land free from incumbrances; nor could the said A A, his heirs and assigns, enjoy the said land forever, according to the covenant aforesaid, but one C C, on &c., entered into the said one hundred acres of land, and took possession thereof in right and title of one G G, who is the rightful owner thereof in fee. And so the said B B broke his covenant aforesaid; and his administrators, since his decease, have never performed the same. REED.

Against administrator on covenant in sale of estate by order of court.

In a plea of covenant broken; for that the said S, at N aforesaid, on &c., by his deed of that date duly executed, acknowledged, and registered, and here in court to be produced, did, as administrator of the goods and estate of T T, late of N aforesaid, Esq., deceased, with his last will and testament annexed, in consideration of the sum of \$1050 lawful money, paid him by the plaintiff, bargain and sell to him and his heirs, a certain parcel of land, flats, and wharf, with a dwellinghouse and all the out-houses, stores, and part of stores thereon, situate in said N, and bounded south-easterly partly on a way and partly on land of said plaintiff; south-westerly on land of B T, Esq.; north-westerly on land belonging to the heirs of M T, and north-easterly on the channel of M river, or however otherwise the same estate might be bounded and described, being all the estate that was conveyed to H D and her heirs by her father J T, by his deed bearing date the fourteenth day of January, in the year, &c.

To have and to hold the same to the plaintiff and his heirs, to his and their use forever; and the said S, by the same deed, *among other things*, did covenant to and with the said plaintiff, that at the time of ensealing the deed aforesaid, he had full right, power and authority to convey all the interest and right which the said T, at his decease, had in the land, flats, wharf, and buildings aforesaid, to the plaintiff and his heirs, to his and their use; and that he had pursued the di-

rection of the law in the sale of the same, and that he and his heirs and assigns should, by force of said deed, hold the same against the claims of all persons claiming the same under the said T, but not against any other claims. Now the plaintiff, in fact says, that the said S, at the time of en-sealing the deed aforesaid, had not full right, power, and authority, to convey all the interest and right which the said T had at his decease in the land, flats, wharf, and buildings aforesaid, to him, the plaintiff, and his heirs, to his and their use, and that he had not pursued the directions of the law in the sale of the same, and that the plaintiff could not by force of said deed, hold said premises against the claims of all persons claiming the same under the said T, according to the aforesaid covenants of said S, and so he says, the said S, although thereto requested, hath not kept his covenants aforesaid, but hath broken the same. *Frothingham v. March, Essex, S. J. C. Nov. Term, 1804.* W. PRESCOTT.

By son and heir against surviving covenantor in a deed of bargain and sale ; for breach of covenants of title.

For that whereas by a certain indenture made at &c., on &c., between the said W and R, of the one part, and the said T B (the plaintiff's father) deceased, of the other part, which other part, sealed with the seals of the said W and R, the plaintiff brings here into court, the date whereof is the day and year aforesaid, the said W and R, for and in consideration of the sum of \$—, (*here follow the language of the deed, describing the lands particularly, with the habendum and the covenants, &c.*) as by the said indenture, among other things, will more fully appear. And the said plaintiff further saith, that although the said T B, his father, in his lifetime, and the plaintiff, since the death of the said T B, hath always well and faithfully performed and kept all and singular the covenants, in the aforesaid indenture specified, on the part of him, the said T B, and his heirs, to be performed and kept, and protesting that the said W and R, in the lifetime of the said R, and the said W, after the decease of the said R, have not observed or performed any of the covenants in the indenture aforesaid specified, on the part of them, the said W and R, or either of them, to be observed and performed ; the said plaintiff in fact says, that whereas long before the making of the indenture aforesaid, one J B was seized of and in the aforesaid parcel of land, in his demesne as of fee ; and being so seized, he, the said J

B, by &c. (*trace the title from J B, the stranger, down to W and R, stating time, place, and the entry of the intermediate occupants*;) and the said W and R being so seized, and not otherwise, nor of any other estate by the aforesaid indenture here produced in court, enfeoffed the said T B, the father, of the said parcel of land &c., to have and to hold to the said T B, his heirs and assigns forever, to the only proper use and behoof of the said T B, his heirs and assigns forever; by virtue of which said feoffment, the same T B entered into the said tract or parcel of land with its appurtenances, and was thereof seized in his demesne as of fee; and being so seized, the same T B afterwards, *viz.* on &c., at &c., died seized of such, his own estate, the plaintiff being the son and heir of the said T B, after whose death the said tract or parcel of land descended to the plaintiff as son and heir of the said T B; by which the said T B, the son, entered into the said tract or parcel of land, and was thereof seized in his demesne as of fee; and the said plaintiff, being so seized, &c. (*set out the eviction*) by reason whereof, the plaintiff avers, that neither the said W, nor the said R, at the time of the sealing and delivery of the indenture aforesaid, were seized of the said tract or parcel of land with the appurtenances, by the indenture aforesaid, bargained and sold, of a good, certain, and indefeasible estate in fee simple; nor &c., (*negative the other covenants relied on in the same manner*) according to the form and effect of the said indenture; and the said plaintiff further avers, that neither the said W nor the said R, at the time of the sealing and delivery of the said indenture, was seized of the said &c., in fee simple, or of any other estate, or in any other manner than as beforesaid. And so the said plaintiff saith, that neither the said R, nor the said W, in the lifetime of the said R, nor the said W, since the death of the said R, although often required, kept the said covenant with the said T B, in his lifetime, nor since his decease have kept the same with the plaintiff, his son and heir, but during the lifetime of the said R, the said W and R have, and either of them always has refused, and since the decease of the said R, the said W still refuses so to do.

On a covenant of warranty of title in a bargain and sale of a sloop.
Bargainee v. Barguiner.

For that the said T, on &c., at &c., by his deed of that date, sealed with his seal, and in court to be produced, in consideration of \$100 paid to him by the plaintiff, granted, bar-

gained, and sold to the plaintiff the hulk and body of a certain sloop, called &c., burthened &c., then lying at &c., together with her boat and appurtenances, to have and to hold the same to the plaintiff and his assigns forever, to their own use and behoof forever; and therein the said T covenanted with the plaintiff, that he, the said T, was the lawful owner of the said sloop and appurtenances, that he had full power and lawful authority and right, to sell the same in manner as aforesaid, and that he would warrant and defend the same to the plaintiff against the lawful claims and demands of all persons whatever. Now the plaintiff in fact says, that the said T was not then the lawful owner of the said sloop and her appurtenances, and that he had no right and authority to sell the same, as aforesaid, and that he has not warranted and defended the same to the plaintiff or his assigns; but the said sloop with her appurtenances, at the time of making and executing the said deed, was the property of one P P, who has since, by the consideration of the justices of our S. J. Court, held at &c., on &c., recovered judgment for the restitution of said sloop and appurtenances; and by virtue of our writ of execution, issued on that judgment in due form of law, in fact obtained restitution and possession of the same. And so the said T, his covenant aforesaid hath not kept, but hath broken the same.

Breach of covenant on a bill of sale of goods.—Bargainee v. Bargainor.

For that the said D, at &c., on &c., by his certain writing, sealed with his seal, and here in court to be produced, bearing date the same day and year, in consideration of the sum of \$—, to him in hand paid by the plaintiff, did bargain, sell and deliver to the said plaintiff the goods and things in the schedule to the same writing described, to have and to hold the same to the plaintiff and his executors, administrators and assigns forever. And he, the said D, by the said writing, covenanted with the plaintiff, that he the said bargainee premises to the plaintiff, his executors, administrators and assigns against all persons would warrant and forever defend, by said writing; as by said writing, with the schedule aforesaid annexed, more fully appears. And the plaintiff in fact says, that the premises aforesaid so sold, and in the schedule aforesaid mentioned, are certain goods and chattels in the brew-house, malt-house, and out-houses, then late of B B, situate &c., and were and are &c., [*describe them.*] And the plaintiff in fact says, that the said D, at the

time of making and sealing the writing aforesaid, had no interest, possession, or property in the said goods or chattels, or any part thereof; but the true property thereof was then in one A A. And so the said D, though often requested, hath not kept his covenant aforesaid, with the plaintiff in this behalf above made, and hath altogether denied, and yet doth deny to perform it to him. *Lilly, 138.*

On a covenant in a deed of transfer of a quarter part of any prizes to be taken.

For that the said T, at &c., on &c., by his deed of that date, sealed with his seal, duly executed and in court to be produced, having shipped himself on board the ship called the Monmouth, then lying in the harbor of said &c., which ship was soon to sail upon a cruise for six months, or whether the said cruise should be longer or shorter, against the enemies of the U. S. of America, being commanded by W N; in consideration of the sum of \$—, paid the said T by the plaintiff, he, the said T, by the name and addition of D T, then residing at N, in the county of E, and state of Massachusetts Bay, granted, sold and assigned unto the plaintiff one quarter part of such single share, as he, the said T, should be entitled to by virtue of his having shipped himself, as aforesaid, and going the said cruise, in all and every the prizes which should be taken by said ship during the said cruise, even if it should be longer than the said six months; the said quarter part of a share to be received by the plaintiff as soon as the said T would have been entitled to receive the same, had he not made the above assignment; and the said T, in and by the said deed, among the other things, did for the consideration aforesaid covenant with the plaintiff, that he, the said T, would go the whole of said cruise, and that he would faithfully do the duty of a mariner during the same, on board the said ship, and that he had not done, and would not do any thing, which should prevent the plaintiff from receiving the said quarter part of a share. And the plaintiff avers, that the said W N on board of said ship, afterwards, on &c., at said &c., sailed upon the same cruise, and continued on the same cruise until the — day of &c. current, when the same was completed, to wit, at said &c.; that said ship in said cruise captured and sent into said &c., and made legal prize of a certain ship, called the Unity, and cargo of the value of &c., and also of a certain brigantine called the Gen. Murray, and her cargo of the value of &c., that one quarter part of such a single share,

as the said T would have been entitled to, had he gone the whole of said cruise and faithfully done the duty of a mariner during the same, is of the value of \$1000; that said T, after he had shipped himself as aforesaid, on board said ship, and after the execution of his deed aforesaid, to wit, on &c., at said &c., deserted from the same ship, and refused to, and did not go on any part of said cruise; by reason of which the said T is not entitled to any part or share of the prizes aforesaid; by reason of all which the plaintiff hath been, and is prevented from receiving any part or share of said prizes. And so the plaintiff saith, that the said T, his covenants aforesaid hath not kept, but hath broken them, all which is to the damage, &c.

2. On Leases.

For that whereas heretofore, *viz.* on &c., at &c., by a certain indenture then and there made between the said plaintiff of the one part, and the said T of the other part, one part of which said indenture, sealed with the seal of the said T, the plaintiff now brings here into court, the date whereof is the day and year aforesaid, the plaintiff *did demise, lease, and to farm let* unto the said T, *his executors, administrators, and assigns, a certain dwellinghouse &c., (except as in the said indenture is excepted) to have and to hold the said dwellinghouse, with the appurtenances (except as aforesaid) unto the said T, his executors, administrators, and assigns, from — to the full end and term of — years, thence next ensuing, and fully to be complete and ended; yielding and paying therefor, yearly and every year, to the plaintiff, the clear yearly rent or sum of — payable quarterly, viz., on &c., in each and every year, by even and equal portions.*

Here follows the statement of the various covenants, upon the breach of which the action is brought.

Covenant to pay rent.

And the said S did thereby for himself, his executors, administrators, and assigns, *covenant &c.* to and with the said plaintiff, *his heirs and assigns, that he, the said S, his executors, administrators or assigns, would well and truly pay, or cause to be paid to the said plaintiff, his heirs or assigns, the said yearly rent or sum of — at the several days and times aforesaid.*

Covenant to repair and leave in repair, &c.

And the said S did in and by the said indenture, *for himself and his executors, administrators, and assigns, covenant &c., to and with the said plaintiff*, his heirs and assigns, (amongst other things) in manner following, that is to say, that he, the said S, and his assigns, from and after the said messuage should have been put in good and tenantable repair, by and at the expense of the said plaintiff, his heirs and assigns, should and would at all times, during the continuance of the said demise, at his and their own costs and charges, support, &c., maintain and keep the said dwelling-house &c. in good and tenantable repair and condition (being allowed timber in the rough, sufficient and proper for such repair, from time to time to be provided and set out by the said plaintiff, his heirs or assigns,) and the same premises and every part thereof, should and would leave in such good repair and condition at the end, or other sooner determination of said term, and should and would peaceably and quietly yield up &c. to the said plaintiff, his heirs or assigns, without doing &c. any waste &c. to the same or any part thereof.

Covenant to cleanse ditches, &c.

And also should well and sufficiently cleanse and repair, *every year during the said demise, all the ditches &c., in the parcel of land, called &c., as often as necessary, and should deliver up unto the said plaintiff, his heirs or assigns, the same in such good order and condition, at the end of the same term as aforesaid.*

NOTE. In like manner, other particular covenants in the lease should be stated, as nearly as possible, in the language of the indenture. It is usual also, to add a reference to the lease, and to allege an entry of the lessee, and an averment of the plaintiff's general performance, and a protestation of the defendant's general non-performance; but these are unnecessary. It is proper, indeed, when an action is brought against the assignee or lessee, to allege an entry by him. It is necessary, also, where there is a condition precedent to be performed on the part of the plaintiff, to aver a performance of it. The breaches may be assigned thus;—

Breach in the non-payment of rent.

And the plaintiff saith, that after the making of the said indenture, and during the said term thereby granted, *viz.* on &c., at &c., a large sum of money, *viz.* the sum of \$— of the rent aforesaid, for — years and a half of the said term then elapsed, became and was, and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect

of the said indenture, and of the said covenant of the said S, by him in that behalf so made as aforesaid, to wit, at &c. aforesaid.

Breach in not repairing, and leaving out of repair.

And the said plaintiff in fact saith, that the said S did not, nor would, during the continuance of the said demise, and whilst he was so possessed of the demised premises, with the appurtenances as aforesaid, at his own costs and charges, support, maintain, &c. all and every the said dwellinghouse &c. (*as in the covenant,*) in good tenantable repair and condition, (*here follows an averment of the performance of conditions precedent;*) although the said dwellinghouse &c., in the possession of the said S, at the time of making the said indenture, were, after the making thereof, to wit, at &c. aforesaid, put in good and tenantable repair, by and at the expense of the said plaintiff, and although timber in the rough, sufficient and proper for such repairs, was allowed, and from time to time provided and set out by the plaintiff, *viz.* at &c. aforesaid; nor did, nor would, leave the same premises in such good repair and condition, at the determination of the said term, according to the form and effect of the said indenture, in that behalf; but on the contrary thereof, he, the said S, after the making of the said indenture, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, *viz.* on &c. and from thence for a long space of time, *viz.* from thence until the determination of the said term, suffered and permitted the said dwellinghouse, &c. (*as in the covenant*), to be and continue, and the same were, for and during all that time, ruinous, fallen down, and in great decay for want of necessary repairing, maintaining, and supporting the same; and the said S, at the determination of the said term, left the same premises in such condition as last aforesaid, contrary to the form and effect of the said indenture, and of the covenant so made by S for himself, and his assigns as aforesaid, *viz.* at &c. aforesaid.

Breach in not cleansing ditches.

And the said plaintiff in fact further saith, that the said S did not, nor would, yearly and every year, during the continuance of the said demise, and whilst he was so possessed of the demised premises with the appurtenances as aforesaid, well and sufficiently uphold, cleanse, scour, or repair

all the ditches &c. in the said parcel of land, called &c. &c. by the said indenture demised, as often as was necessary, so as to keep the same cleansed &c., and in good condition; nor did nor would deliver up the same unto the plaintiff in such good order and condition, at the end of the said demise, according to the form and effect of the said indenture in that behalf, but wholly neglected so to do, and on the contrary thereof, he, the said S, after the making of the said indenture, and during the continuance of the said demise, and whilst he was so possessed of the demised premises, with the appurtenances, to wit, on &c., and from thence for a long space of time, viz. from thence until the determination of the said demise, suffered and permitted the said ditches &c., in the said piece and parcel of land, called &c., and all other the ditches &c. in the said premises by the said indenture demised, to be and continue, and the same were, for and during all the time last aforesaid, foul, miry, choked up, ruinous, out of repair, and in bad condition, for want of well and sufficiently cleansing, scouring, and repairing as aforesaid; and at the determination of the said term, he, the said S, delivered up the same unto the said plaintiff in such condition as last aforesaid, contrary to the form and effect of the said indenture, and of the said covenant in that behalf made as aforesaid, to wit, at &c. aforesaid.

Breach of covenant to repair, &c. in not glazing the windows, and in making divers alterations in the demised premises.

And the said plaintiff in fact saith (*averment of performance of condition precedent*;) that before the commencement of the said term, viz. on &c., he, the said plaintiff, put the demised premises and every part thereof into good and sufficient repair, and well and sufficiently glazed all the windows belonging thereto, according to his covenant aforesaid; but the said plaintiff saith, that the said S did not pay &c. (*first breach for not paying the rent*.) And the said plaintiff further in fact saith, that the said S did not at the end of the said term of four years leave and yield up unto the said plaintiff, the glass windows belonging to the said premises, nor any of them well and sufficiently glazed, although the same and every part thereof were put into good and sufficient repair by the said plaintiff, before the commencement of the said term of four years as aforesaid, contrary to the form and effect of his, said S's, covenant in this behalf. And the plaintiff further in fact saith, that the said S, at the end of the said term of four years, did not leave

and yield up the premises, nor any part thereof, unto the plaintiff, in the same plight as they were put into at the commencement thereof as aforesaid, which he ought to have done, according to the form and effect of his covenant in this behalf made, but the said S kept and continued in possession of the premises, and used and occupied the same for a long space of time, to wit, a year and a half after the expiration of the said term of four years; and the said S, during the said term of four years, for his own convenience, made several alterations in the premises, to wit, in pulling down a wall, parcel of the premises, in building up a brick chimney upon the said premises, &c. (*state the alterations particularly,*) and continued the same alterations until, and at, and after the end of the said term of four years, and did not at the end of the said term, nor since, put the same nor any of them into, nor restore them to the same plight and condition, as they were put into at the commencement of the same term of four years, nor leave nor yield up the premises to the plaintiff, in such plight and condition as aforesaid, contrary to the form and effect of their said covenant in this behalf made.

Breach of special covenant, not to take above two crops successively, &c.

And the said plaintiff also further saith, that the said S, during the continuance of the said demise, to wit, in the several and respective years, 1801, 1802, &c., took above two crops successively, to wit, three crops successively in each of those respective years, of corn and grain, to wit, of wheat, barley, rye, peas, beans, and oats, from and off great part, to wit, twenty acres of the said demised premises, without summer-tilling the same in a husband-like manner, and, in each and every of those six last mentioned years, did dig, plough up, break up, and convert into tilage, divers acres, to wit, ten acres of the meadow ground, belonging to the said demised premises, without the license or consent of the plaintiff in writing, under his hand first had and obtained; yet the said S did not pay, or cause to be paid to the plaintiff, the said sum of \$— an acre, that he had so third cropped, or any part thereof; but hath therein wholly failed and made default, contrary to the form and effect of the said indenture, and of the aforesaid covenant of the said S, so made with the plaintiff in that behalf as aforesaid.

For breach of covenant, in destroying fish in ponds, &c.

And the plaintiff further saith, that the said S, during the aforesaid demise, viz. on &c., and on divers other days and times between that day and the day of the date of *this writ*, did take and destroy divers large quantities of fish, being in the said ponds, belonging to the said premises, viz. five hundred brace of carp, &c. &c., and during that last mentioned time, permitted divers other persons, to the plaintiff unknown, to take and destroy, and they did accordingly by such permission take and destroy, divers other great quantities of the fish, being in said ponds, to wit, five hundred other brace of carp, &c. &c. (*as before*,) contrary to the form and effect of the said indenture, and of the aforesaid covenant of the said S, so made in that behalf as aforesaid.

For breach of covenant in felling timber, &c.

And the plaintiff further saith, that the said S, during the continuance of the said demise, viz. on &c., and on divers other days and times, between that day &c., did fell, cut down, stub up, grub up, and pull up, the trees; timber and bushes, viz. one hundred cart-loads of timber, &c., &c., such as were never allowed to the said S, for or towards the reparation of the said premises, contrary to the form and effect of the said indenture, and of the said covenant of the said S, so by him made with the plaintiff as aforesaid.

For not spreading hay, &c., nor spending manure &c., upon the premises, but carrying them off, &c.

And the plaintiff further saith, that the said S, during the said years, &c., or in any of them, or at any time since, did not spend and spread out on the premises, all the hay, straw, and stover, during those years arising thereupon (except wheat straw, rye straw and clover hay,) but therein wholly failed, contrary to the form and effect of the same indenture and of the said covenant of the said S made in that behalf as aforesaid. And the plaintiff further saith, that the said S hath not within the said six last mentioned years, or in any or either of them, or at any time since, laid or spread upon any part of the said premises, all or any of the muck, dung, manure and compost, which during all that time was raised and made there on the said premises, but therein did wholly fail and make default, contrary to the form and effect of the said indenture, and of the said

covenant of the said S, made in that behalf as aforesaid. And the plaintiff further saith, that the said S, in each and every of the said years &c. carried off and from the said demised premises, divers great quantities, viz. one hundred cart-loads of hay, one hundred cart-loads of straw, one hundred cart-loads of dung, &c. which during those years arose, was made and raised on the said demised premises; the said hay, straw and stover, being other hay, straw and stover, than wheat straw, rye straw, or clover hay; yet the said S hath not allowed or paid the plaintiff \$— a load, for every load of the said hay, and \$— a load, for every load of the said straw &c., that was so carried off the said premises, or any part thereof, but hath therein wholly failed and made default, contrary, &c.

General conclusion.

And so the plaintiff says, that the said S hath not kept his said covenants, so made with the plaintiff as aforesaid, although often requested so to do, but hath hitherto refused and still refuses so to do.

For breach of a covenant for quiet enjoyment. — Lessee v. Lessor.

For that whereas, by a certain indenture, made on &c., at &c., between the said T of the one part, and the plaintiff of the other part, one part of which said indenture is in court to be produced (the date whereof is the day and year aforesaid,) the said T did demise &c. to the said plaintiff, his executors &c., a certain parcel of land, &c., to have and to hold (*follow the indenture*) as by the same indenture more fully appears. And the plaintiff avers, that the said T, before the making of the said indenture, viz. on &c., at &c., demised the said &c., to one R S, to have and to hold from &c., to the full end and term of — years, thence next following, and fully to be complete and ended. And the plaintiff further saith, that he, the plaintiff, after the said — day of &c. (*the date of the lease to the plaintiff*) entered into the premises, so demised to him as aforesaid, and was thereof so possessed, and upon the plaintiff's possession, the said R S afterwards, viz. on &c., at &c., entered, claiming his said term, by virtue of the demise made to the said R S by the said T, as aforesaid, and expelled the plaintiff from the said &c., and from thence hitherto hath been, and still is possessed thereof; by reason whereof the plaintiff hath been unable to have and to hold the said &c., from the said — day of &c., to &c. (*the end of his term*), accord-

ing to the form and effect of the indenture so made with the plaintiff, by the said T as aforesaid; and so the said T, his covenant aforesaid, although often required, hath not kept, but hath broken the same, in this, that the plaintiff could not hold and enjoy the said &c., from &c., to the full end and term of &c. years, according to the form and effect of the said indenture, &c.

By assignee against assignor of leasehold premises, for breach of a covenant for quiet enjoyment, &c.

For that whereas, by a certain indenture, made on &c., at &c., between the said R of the one part, and the plaintiff of the other part, one part whereof is by the said plaintiff to be produced in court, the date whereof is the day and year aforesaid, the said R did assign (&c.) unto the plaintiff (*his &c.*) certain tenements with the appurtenances therein described, to have and to hold unto the plaintiff, his &c. from thenceforth, for and during all the remainder &c. of a term of — years, then unexpired, but nevertheless subject to a certain yearly rent of &c., and the performance of certain covenants and agreements therein mentioned; and the said R for himself &c., did, by the said indenture (amongst other things) covenant &c. with the plaintiff, his &c., he and they paying the said annual rent, and performing the covenants &c. in the said indenture mentioned, from time to time, and at all times thereafter during the said term therein, should peaceably &c. occupy &c., and enjoy the assigned premises &c., from the day of &c. then last past, and should receive the rents &c. thereof, to his own proper use, without the lawful hindrance &c. of the said R, or by any other person or persons claiming by, from, or under him, and that free from all manner of other grants, assignments, leases, trusts, &c. arrears of rent, &c., and incumbrances whatsoever, had, made &c. by the said R, or by any other person or persons claiming by, from, or under him, except the said rent of &c. from thenceforth to be paid as aforesaid, as by said indenture more fully appears; by virtue of which assignment the plaintiff afterwards, viz. on &c., at &c., entered upon the said premises &c., and became and still is possessed thereof for the remainder of the said term therein as aforesaid; and although the plaintiff always, from the time of making the said indenture hitherto, hath well performed &c. all things in the said indenture on his part to be performed; yet, protesting that the said R hath not performed any thing in the said indenture contained, on his

part to be performed, the plaintiff avers, that, before and at the time of the said assignment of the said premises, large arrears of rent, *viz.* the sum of &c., for — years, arrears of rent of the said premises, remained unpaid to the ground landlord thereof, and that afterwards and before the exhibiting of the plaintiff's bill (*or before the date of this writ*) *viz.* on &c., at &c., he, the said plaintiff, was obliged to pay the same *in order to prevent his goods and chattels, then being on the said premises, from being distrained for the same*; to wit, to one A B, to whom the same then and there of right was due and payable; whereof the said R then and there had notice, and was then and there required to save the plaintiff harmless from the same; yet the plaintiff avers, that the said R, when requested, did not save the plaintiff harmless from the said arrears of rent, or any part thereof, but wholly refused so to do, contrary, &c.

Lessor v. Assignee of lessee for years, for not paying rent.

For that whereas the plaintiff, by a certain indenture, made at &c., on &c., between the plaintiff, and one R, (lessee) one part of which said indenture &c., for the consideration therein mentioned, did demise &c. unto the said R, *his &c.*, all that &c., to have and to hold the said &c., with their appurtenances unto the said R, *his &c.*, from — next ensuing the date of the said indenture, unto the full end and term of — years from thence next ensuing, yielding and paying therefor &c. (*as in the lease.*) And the said R, for himself &c., did covenant with the plaintiff, *his &c.*, that he or some of them should pay to the plaintiff, *his heirs or assigns*, the said yearly rent of — at the times and places therein before mentioned &c., by virtue of which said demise the said R entered into the said demised premises with the appurtenances, and was possessed thereof; and being so possessed thereof, afterwards, *viz.* on &c. the said demised premises, with the appurtenances, and all the estate, interest, and term of years of the said R therein to come, and unexpired, came to the said D by assignment. By virtue whereof the said D entered into the said demised premises so assigned as aforesaid, and was and still is possessed thereof; and being so possessed thereof, the said D did not pay to the plaintiff the sum of \$— of the said yearly rent, which became due from the said D to the plaintiff after the said assignment, for half a year of the said term, ending on &c., according to the form and effect of the said covenant of the said R, so made with the plaintiff in

that respect as aforesaid, or any part of the said sum at any time hitherto; but the said sum of \$— of the rent aforesaid, still remains due, and in arrears from the said D to the plaintiff, *contrary* to the form and effect of that covenant; and so the plaintiff saith, that the said D, after the said assignment, hath not kept the covenant of the said R, so made with the plaintiff in that respect as aforesaid, but hath broken it, &c.

By a surviving executor against grantor, on a warranty of title made to testator, (with special conclusion.)

For that whereas, by a certain indenture, made on &c., at &c., between the said B T, of the one part, and C N &c., (*the testator*) in his lifetime, of the other part, (one part whereof &c.) the said B T, in consideration of \$—, the receipt &c., did grant &c. unto the said C N, in his lifetime, a certain parcel of land &c., to have and to hold &c. unto the said C N, his heirs and assigns forever. And the said B T, did, by the same indenture, for himself &c., covenant with the said C N, his &c., that he, the said B T, (*set out the covenants as nearly as may be in the language of the deed,*) as by the said indenture more fully appears. And whereas the said C N, in his lifetime, afterwards, *viz.* on &c. did make his last will and testament in writing, and thereby among other things, did direct &c., and of the said will did appoint one R M and the plaintiff his executors, and soon after died, (which said will was afterwards, *viz.* on &c., approved and allowed by the judge of probate for the county of &c.) and whereas the said R M is since dead, and the plaintiff hath survived the said R M, the said plaintiff in fact saith, that the said B T, at the time of sealing and delivering the said recited indenture, was not seized of the said parcel of land &c. in his demesne as of fee. And the plaintiff further in fact says, that the said B T, at the time &c., had not in himself good right, full power, and lawful authority, to grant, bargain and sell the said parcel of land &c., unto him, the said plaintiff, his heirs and assigns, in manner aforesaid; and so the plaintiff saith, that the said B T, his covenant aforesaid with the said C N, in his lifetime, in form aforesaid made, hath not kept, but the same hath broken, and the same covenant to him, the said C N, in his lifetime, or to them, the said R M and the plaintiff, after the death of the said C N, in the lifetime of the said R M, or to the plaintiff, since the death of the said R M, he, the said T, though required &c., hath altogether refused and

still refuses to keep. (*Here make profert, if necessary, of letters testamentary.*) But it is not necessary in Massachusetts.

3. *For breach of indentures of apprenticeship, articles of clerkship, &c.*

By apprentice against master for breach of indentures.

For that, by a certain deed, indented and made at &c., on &c., between the said S, on the one part, and the plaintiff, on the other part, one part thereof sealed with the seal of the said S, is in court to be produced, the said S, for the consideration therein mentioned, did covenant and promise to instruct the plaintiff in the art and calling of a saddler, which he, the said S, then and there used, and to find the plaintiff good and sufficient meat, drink, apparel, washing, and lodging, and all other necessities, both in sickness and in health, from &c. until the plaintiff should arrive at the age of twenty-one years, and at the expiration of said term to give unto the plaintiff two good suits of apparel, both linen and woollen, suitable for such a person, and to teach, or cause the plaintiff to be taught, to write and cipher. And the plaintiff avers, that the said S hath not instructed him, the plaintiff, in the art and calling of a saddler during the said time, though the plaintiff was capable of learning the same, but hath wholly neglected so to do; nor hath the said S given to the plaintiff two good suits of apparel as afore-said, suitable for the plaintiff, although the plaintiff did, at &c. attain to the age of twenty-one years, on &c., and although the said S hath been often since requested; neither hath the said S taught, or caused to be taught, the plaintiff to write or cipher. And so the said S, his covenants afore-said, hath not kept, but hath wholly broken the same.

By master against clerk, or father, &c., for breach of articles. — First breach. Disobedience, &c.

For that by a certain indenture made at &c., on &c., between the plaintiff of the one part, and the said S and Peter (*the clerk*) of the other part, one part of which said indenture, sealed with the seal of the said D, the plaintiff brings here into court, bearing date the day and year afore-said, the plaintiff, for and in consideration of &c. (*use the language of the articles as nearly as possible in the recital,*) as by the said indenture at large appears. And the plaintiff in fact saith, that although he hath always, from the time

of making the said indenture, hitherto well and truly performed &c. (*plaintiff's general averment of performance of his covenant*;) yet, protesting that the said S hath not performed &c. (*protestation of general breach by defendant*) he, the said plaintiff, avers, that although he took the said Peter to be his clerk, and the said Peter, by the direction of the said S (*his father*,) did put himself to dwell, and be clerk with the plaintiff, according to the true intent of the said indenture, he, the said Peter, did not faithfully &c. serve his master, the plaintiff, in all things as a diligent clerk ought to have done, nor all his master's lawful orders &c. faithfully obey and perform; but during the said term, *viz.* on &c., and on divers other days, between that day and the — day of &c., at &c., wholly neglected and refused to obey or perform divers lawful orders &c. of the plaintiff, his master, on the said — day of &c., and on divers other days, given in command by the plaintiff to the said Peter, to be by him obeyed and performed, CONTRARY to the form and effect of the said indenture, and of the covenant of the said S, made in that behalf as aforesaid.

Second breach. — Absenting himself from his master's service.

And the plaintiff further saith, that after the making of the said indenture, and during the said five years, *viz.* on &c., he, the said Peter, absented himself from the service of the plaintiff, without leave of the plaintiff, and against his will, and continued so absent from the service of the plaintiff, against the will of the plaintiff, and without his leave, for a long time, *viz.* for the space of twenty weeks, then next following, CONTRARY, &c.

Third breach. — Doing business on his own account, &c.

And the plaintiff further saith, that the said Peter, so being the clerk of the plaintiff as aforesaid, after the making of the said indenture, and during the term aforesaid, *viz.* on &c., and on divers other days between that day and the day of the date of this writ, did practise and cause to be done, divers businesses in the way of a scrivener and writer &c., to his own use and profit, and not for or on account of the plaintiff, his master, without the leave of the plaintiff first obtained for that purpose in writing; and that no part of the profit of the said business so done by the said Peter as aforesaid, hath been received by the plaintiff, contrary, &c.

Fourth breach. — For destroying papers, embezzlement, &c.

And the plaintiff further in fact saith, that the said Peter, during his said clerkship with the plaintiff, viz. on &c., at &c., and on divers other days, between that day &c., did lend, consume, alter, cancel, obliterate, tear, destroy, burn, spoil and deface, convey away, secrete, and embezzle, purloin, waste, give away, and misspend divers sums of money, books, goods, chattels, deeds, bonds, specialties, bills, notes, judgments, rolls, records, pleadings, writs, papers, processes, proceedings, accounts, evidences, and writings of the plaintiff, and of divers persons, who, during the time aforesaid, *were clients of the plaintiff (according to the case)* which were in the custody of the said Peter, to the use and benefit of the plaintiff *and of divers of his* clients, in his business aforesaid, and also divers other sums of money, books, goods &c. &c., *(as before,)* which, within the time last aforesaid, were in the custody or power of the said Peter, and which he was entrusted with by the plaintiff in his business aforesaid; and that the said Peter hath not at any time during the time last aforesaid, or at any time afterwards hitherto, with all convenient speed or otherwise howsoever, although often required by the plaintiff, during the said time, given notice of, delivered to, accounted with, or paid the same, or any of them, or any part thereof to the plaintiff, his master, or to his order, CONTRARY, &c.

Fifth breach. — For discovering his master's secrets, &c.

And the plaintiff further saith, that the said Peter hath not at all times after the making of the said indenture, and until the suing out of this writ, faithfully kept the secrets of his said master, the plaintiff, and of the plaintiff's clients, but on divers days and times, during the time last aforesaid, discovered and made known the lawful secrets of the plaintiff, his master, and the clients of the plaintiff in his said business, to divers persons; whereby the plaintiff, and his clients in his said business, were greatly injured and prejudiced, CONTRARY, &c.

Sixth breach. — For not accounting for money, &c.

And the plaintiff further saith, that the said Peter, during the said term, from the time of the making of the said indenture, until &c. had and received divers sums of money of the plaintiff, and of divers other persons, to the use of the plaintiff, and that he, the said Peter, hath not weekly

nor in any one week, during the time last aforesaid, although the said Peter was thereto required every week, during the same, by the plaintiff, his master, rendered unto the plaintiff, a true and perfect account, in writing under his hand, or otherwise, of all, or any sum or sums of money whatsoever, had and received of, or from, or to the use of his said master, the plaintiff, during the time last aforesaid, nor paid the same to the plaintiff, or any balance of any account whatsoever, but hath wholly neglected and refused so to do, CONTRARY, &c.

4. *For breach of covenants in other cases.*

For freight under a charter-party.

For that whereas, on &c., at &c., by a certain charter-party of affreightment, indented, of that date, made and concluded upon between the said T and E [defendants,] on the one part, and the plaintiff on the other, one part whereof under the hands and seals of the said T and E, is in court to be produced; the plaintiff, for the considerations therein mentioned, did let to freight unto the said T and E, the whole hull &c. [*as in the charter-party*] for a voyage from &c., to &c., and thence back to &c., the place of her discharge, the dangers of the seas excepted. And the plaintiff, among other things, did then covenant with the said T and E, that the said ship was then and there, and during said voyage, should continue to be sound, strong, and well fitted for such a voyage. And the said T and E, in consideration thereof, did therein, among other things, covenant to pay to the plaintiff, his executors, &c. the sum of \$— for every ton aforesaid for every calender month, and so in proportion for a less time than a month, said ship should be in the service of the said T and E, upon said voyage, commencing from the date of said charter-party, and ending at the time of her discharge from the said voyage, at &c.; and that the whole of said hire should be paid within ten days after her discharge from said voyage, at &c., and that the said T and E would victual and man said ship during said voyage, and would pay port charges, and also would insure and pay the plaintiff the sum of \$—, being the sum the said ship was appraised at, and valued by the mutual consent of the parties, in case said ship upon said voyage, or in any port or place in consequence thereof, should be seized for the supposed breach of any acts of trade, the restraints

of pirates excepted. And it was therein mutually agreed between the said parties, that one A A should be master of said ship, during said voyage; and in case said ship should not be ready when loaded, that, in that case, the hire should cease until she should be ready; to the true performance of which covenants, the said parties therein bound themselves, each unto the other in the penal sum of \$—. Now the plaintiff avers, that he has well and truly done and performed all things, in the said charter-party, on his part covenanted to be performed, and that the said ship, with her appurtenances, was by the said T and E, taken into their service on &c., and on &c., was loaded, and was then ready and did proceed on said voyage, to &c., arrived safe there, on &c., and thence proceeded back to &c., and on &c. arrived at &c., to wit, at &c., and was there on the same day discharged from said voyage. And the plaintiff further avers, that the whole hire of said ship, with her appurtenances, during said voyage, amounted to the sum of \$—, whereof the said T and E thereafterwards, on the same day had notice; yet the said T and E, or either of them, though the said ten days have expired, and though since requested, have never paid the said sum of \$—, but the said T and E, their covenants aforesaid, in these particulars have not kept, but altogether broken; and the said T and E, and each of them still wholly refuse to perform the same.

JONA. SEWALL.

On a note under seal.

For that the said T, on &c., at &c., by his deed of that date, in court to be produced, covenanted with the plaintiff, to pay him or his order, the sum of \$100, on demand, with interest for the same until paid; yet the said T, though often requested, hath not paid the said sum of \$—, nor the interest thereof, but wholly neglects and refuses so to do. And so the said T, his said covenant hath not kept, but hath broken the same.

R. DANA.

For wages of servant by the master according to covenant.

For that the plaintiff, on &c., at &c., let out to the said R, his, the plaintiff's servant-man, named John, to serve the said R, as an able fisherman, faithfully at sea and on shore, from &c. to &c., now past; in consideration whereof, the said R, at &c., on &c., by his deed of that date duly executed, and in court to be produced, covenanted with the plain-

tiff to pay him for the said service, the sum of \$—, at or before &c., which is long since past. Now the plaintiff avers, that his servant aforesaid, well and faithfully served the said R, as an able fisherman at sea and on shore during the term aforesaid ; yet nevertheless the said R, not regarding his said covenant, hath not paid the plaintiff the said sum of \$—, though requested, and still refuses so to do. And so the said R, his covenant aforesaid, hath not kept, but hath broken the same.

BOLLAN.

For price of lumber according to an indenture.

For that whereas, by certain deeds, interchangeably made between the said R and the plaintiff, on &c., at &c. bearing date the same day, one part whereof, under the hand and seal of the said R, is in court to be produced, the plaintiff covenanted with the said R to provide for him, and to deliver him or his order, one hundred tons of good white timber, fit for the European market, at a convenient landing-place on Kennebec river, on or before the first day of May, then next ensuing, but now past ; in consideration whereof, the said R covenanted by the same deed with the plaintiff, to pay him after the rate of \$— per ton, for the same timber, delivered as aforesaid, amounting in the whole to \$—. Now the plaintiff says, that he, in pursuance of the agreement and covenants aforesaid, did procure for the said R, one hundred tons of good white timber, fit for the European market, at a convenient landing place in Kennebec river, and did deliver the same on the first day of May aforesaid, to the said R's order ; and that he, the plaintiff, hath done and performed all things by him, according to the covenant aforesaid to be performed ; yet the said R hath never paid the said sum of \$—, or any part thereof, to the plaintiff, but wholly refuses and neglects so to do ; and so hath not kept his covenant aforesaid, but hath broken the same.

DEBT.

1. *Where debt lies.*

An action of Debt lies upon any express contract, written or unwritten, sealed or unsealed, to recover the debt due upon it. Thus it lies

upon recognizances, bonds and covenants to pay money, in leases, charter-parties, or other instruments. It may be maintained also for money lent, laid out and expended; for interest; for goods sold and delivered, or work done; and generally whenever Indebitatus Assumpsit will lie Debt may be maintained, and though Debt generally goes for a precise sum, it may be maintained on a *quantum meruit*, or *quantum valebant*. However, Debt is seldom brought on a simple contract. Debt lies for money awarded; for use and occupation by parol demise, &c.; for tolls; fees; the penalties of by-laws, &c. It is the proper remedy to recover penalties imposed by statutes, especially if no other remedy is pointed out.

Debt lies upon judgments, whether a year has expired or not. It lies upon foreign judgments, and though the defendant may show the grounds of such judgment, and impeach them, it is not necessary to set forth the grounds of the judgment in the declaration. Doug. 6.

Debt also lies in many cases of implied contracts; as if money is paid to A for the use of B, B may bring Debt for it. Yelv. 23. So for money levied by a sheriff. 1 Rol. 598.

Where a lessee has been evicted from part of the leased premises, by a stranger, Debt is the proper remedy for the lessor to recover an apportionment of the rent. 2 East, 578.

Debt is the proper remedy to recover against a devisee of land, for a breach of a covenant running with the land, made by the devisor. 7 East, 12.

Debt may be maintained by the payee of a promissory note against the maker, or by the payee of a bill of exchange, expressed to be for value received, against the drawer. 2 Bos. & Pul. 82. So by the drawer against the acceptor. Chitty on Bills, 428, *in notis*.

In *Lane v. Smith*, 2 Pick. 281, it is made a *quare* by the reporter, whether in this commonwealth an action of Debt can be maintained on a bail-bond. The question is there left open by the court.

2. Where debt will not lie.

Debt generally will not lie where the amount of damages is so uncertain, that a jury is necessary for the assessment of them.

Debt cannot be maintained for a collateral undertaking, as to pay the debt of another, in consideration of forbearance, &c. 2 Bos. & Pul. 83; Salk. 23.

Neither can it be maintained against an indorser of a bill or note, by a remote indorsee; nor by the payee or an indorsee against an acceptor of a bill of exchange. 2 Bos. & Pul. 78; 1 Taunt. 540. Privity between the parties seems to be essential to this action.

After an assignment of a lease, and acceptance of rent from the assignee, Debt cannot be maintained against the lessee, though lessor may bring covenant against him. 1 Saund. 241, n. s.

Upon a mere bailment, as for money delivered in a bag, it seems Debt cannot be maintained. 1 Rol. 597, l. 20.

Where a promissory note is payable by instalments, Debt cannot be sustained until the whole is due. 1 Hen. Bl. 548.

1. Debt on simple contracts.

Though the action of Assumpsit has superseded the action of Debt on simple contracts, yet as it may frequently be convenient to adopt the

latter form of action, for the sake of joining in the same suit different causes of action, for some of which an action of assumpsit cannot be sustained, it may not be amiss to introduce here some of the most usual forms of declarations in Debt on simple contracts. From the few which here follow, it will be readily perceived that a very slight alteration is sufficient to turn the common counts in Assumpsit, on simple contracts, to corresponding ones in Debt, and the introduction of more of them would therefore be superfluous.

On an account annexed.

For that whereas the said S, on &c., at &c. was indebted to the plaintiff in the sum of \$—, according to the account annexed, to be paid to the plaintiff by the said S on request, which sum remaining unpaid by the said S, an action hath accrued to the plaintiff to demand and recover of the said S, the said sum; yet though requested, &c., (*as in Assumpsit.*)

Indebitatus. — Count generally for goods sold and delivered without a schedule.

And whereas also the said S, on &c., at &c., was indebted to the plaintiff in the sum of \$—, for divers goods, wares, merchandise and chattels, before that time sold and delivered to the said S, at his request, and to be paid by the said S, to the plaintiff, when he, the said S, should be thereunto afterwards requested; whereby and by reason of the said sum of money remaining unpaid, an action hath accrued to the plaintiff to demand and have of the said S, the said sum of \$— above demanded; yet the said S, though often requested, hath not paid the said sum of \$—, *but refuses so to do.*

NOTE. The words in italic might be omitted, and the words, *but unlawfully owes and detains the same*, substituted, which seems to be the proper conclusion of a count in Debt. The former conclusion, however, seems preferable, as avoiding the niceties respecting the proper mode of bringing the action, i. e. whether in the *debet* and *detinet*, or only in the *detinet*. These distinctions, however, may be reduced to these plain principles:—1. If the defendant is indebted to the plaintiff, each in his own right, the action is in the *Debet* and *Detinet*. 2. If the defendant is not personally indebted, but is sued merely as an executor, &c., the action is in the *Detinet*. 3. Husband and wife, for the debt of the wife before marriage, are sued in the *Debet* and *Detinet*. 4. Where it is said, that for goods and chattels, guineas, or foreign coins, Debt lies in the *Detinet*, nothing more is meant than that, where specific articles are sued for, the action of *Detinue* must be brought; for *detinue* is of the same nature with the action of debt, and was anciently included in it, and may now be joined in the same writ with it. 5. Executors, &c. sue in the *Detinet* only. 6. Assignees of bankrupts, sue in the *Debet* and *Detinet*.

The form of a *quantum meruit* in debt generally is unnecessary, as

the plaintiff may recover, what he is entitled to receive, on the indebtedness count in Debt. See 1 H. Bl. 249. If introduced after other counts, however, it may be as follows:—

Quantum meruit in Debt.

And whereas also, on &c., at &c., in consideration that the plaintiff, at the like request of the said R, had before that time sold and delivered to the said R, divers goods, wares, merchandise, and chattels, the said R then and there agreed to pay to the plaintiff so much money as he reasonably deserved to have therefor, when the said R should be thereto requested by the plaintiff; and the plaintiff avers, that he reasonably deserved to have of the said R, for the said goods, wares, merchandise, and chattels, the further sum of \$—, whereby an action hath accrued to the plaintiff to demand and have of the said R the said last mentioned sum; yet the said R, though requested, hath not paid the said several sums of \$— and \$—, amounting in the whole to the sum of \$—, but refuses so to do.

In like manner, the counts for labor done; for money lent, paid, had and received, &c., may be easily framed from those in Assumpsit.

Payee v. Maker of a promissory note.

For that the said R, on &c., at &c., by his promissory note of that date, by him subscribed, for value received, promised the plaintiff to pay him, or his order, on demand, the sum of \$—, by means whereof the said R, then and there became liable to pay the plaintiff the said sum, according to the tenor and effect of the said promissory note; yet, although the said sum of money hath been long since due and payable, and although requested, the said R hath never paid the said sum, but refuses so to do, whereby an action hath accrued to the plaintiff to demand and have of the said R, the said sum of \$—, which the said R, owes and unjustly retains.

Payee v. Drawer of a bill of exchange.

For that the said D, on &c., at &c., made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to one A B, by which bill of exchange the said D then and there requested the said A B, two months after the date thereof, to pay the said E F or order, the sum of \$—, value received, and then and there delivered the said bill of exchange to the said E F, which said bill of exchange the

said A B afterwards, viz. on &c., at &c., upon sight thereof, accepted according to the usage of merchants; and the plaintiff avers, that afterwards, when the said bill of exchange became due according to the tenor and effect thereof, viz. on &c. at &c., the said bill of exchange, so accepted as aforesaid was duly presented and shown to the said A B for payment thereof, and the said A B was then and there requested to pay the said sum therein specified, according to the tenor and effect thereof, and of his said acceptance thereon; but that the said A B did not, and would not then, or at any other time before or since, pay the said sum of money, but then and there wholly refused so to do, of all which said several premises, the said D thereafterwards, viz. on the same day, had notice; by means whereof, he, the said D, became liable to pay to the plaintiff the said sum, specified in the said bill, when thereunto afterwards requested; *and being so liable, the said C D, in consideration thereof, afterwards, viz. on &c., at &c., agreed to pay the said A B the said sum of money in the said bill of exchange specified, when the said D should be thereunto afterwards requested*; whereby and by reason of the said sum of money in the said bill of exchange specified, being and remaining wholly unpaid, an action hath accrued to the plaintiff to demand and have of the said D the said sum of &c.; yet though requested, &c.

NOTE. This count, if the words in italic are included, is a good declaration in Assumpsit, the word "agreed," being equivalent to "*super se assumpsit*." But the words in italic, though essential in Assumpsit, seem to be superfluous in Debt, where, on the circumstances set forth in the declaration, the law creates the liability and gives the action, without the necessity of raising an implied promise to support the action, as in Assumpsit. These two last declarations, though greatly abridged from the English precedents, it is obvious, are susceptible of further retrenchment. But this is submitted to the discernment of the reader.

By adopting the above declarations in Debt on simple contracts, the plaintiff may join in the same action, counts on promissory notes or bills of exchange, &c., or for goods sold and delivered, &c., with declarations on bonds, leases, judgments, &c.

2. Debt on Awards.

For Assumpsit on awards, see ante. p. 191.

For not paying money awarded by arbitrators.

For that whereas certain differences were had and moved between the said plaintiff and the said S, of and concern-

ing &c. (*here state the differences,*) and for appealing said differences, the said plaintiff and the said T, on &c., at &c., put themselves on the award, determination, and judgment of C, of &c., and W, of &c., arbitrators indifferently elected between them, to award, order, and judge, touching the premises; and the said C and W, having taken upon themselves the burthen of awarding and adjudging in the premises, afterwards, *viz.* on the same day, at &c., made their award in writing touching the premises, and awarded, ordered, and adjudged, that the said T should pay to the said plaintiff the sum of \$— for the said A's time; whereby an action hath accrued, &c.

Declaration on an award, where the submission was by bonds, &c.

For that whereas certain differences being depending between the plaintiff and the said D, the plaintiff heretofore, *viz.* on &c., at &c., by his bond bearing that date, became bound to the said D in the sum of \$—; and the said D, then and there, by his bond of the same date, became bound to the plaintiff in the sum of \$—; which said bonds were respectively conditioned to abide the award of E F, of &c., *an arbitrator named and elected, as well on the part of the said D, as on the part of the plaintiff, to arbitrate &c. of and concerning all, and all manner of action and actions, &c.* (as in the submission,) *so as the said award should be made in writing under the hand of the said E F, and ready to be delivered to the said parties in difference, or such of them as should desire the same, on or before the — day of &c. (follow the words of the submission.)* And the plaintiff says, that the said E F, having taken upon himself the burthen of the said arbitration, did in due manner and within the time for that purpose appointed, *viz.* on &c., at &c., duly make and publish his award *in writing, subscribed with his own proper hand &c. (this should conform to the bond)* of and concerning the said differences between the said parties, ready to be delivered to the said parties, or such of them as should desire the same, and bearing date &c., and did thereby award *that the said D should pay to the plaintiff the sum of \$—, (setting forth so much of the award as concerns the payment of the money)* which, when paid, should be in full satisfaction of all demands of the plaintiff upon the said D, on account of the said differences; and the said E F did further award, that the said D should pay to the plaintiff the sum of \$—, for the costs of the said award &c., as by the

said award, reference thereto being had, will more fully appear; of which said award the said D afterwards, *viz.* on &c., at &c., had notice; and though the said D did afterwards, *viz.* on &c., pay to the plaintiff the said sum of \$—, in the said award mentioned; yet the said D did not, on the said day in the said award, in that behalf mentioned, pay to the plaintiff the said sum of \$—, in the said award in that behalf mentioned, or any part thereof, although thereto requested, *viz.* on &c., appointed for the payment of the said sum of \$—, *viz.* at &c., whereby an action hath accrued to the plaintiff to demand and have of the said D the said sum of \$—, parcel of the said sum of \$— above demanded, &c.

NOTE. Where the submission is by bond, the plaintiff has an election to sue on the bond, or on the award, if it is merely for the payment of money. But if a collateral thing is awarded, the suit must be on the bond, as Debt will lie for money only. 2 Saund. 62, n. 5. However, Detinue may be maintained for a collateral thing awarded, as a horse, &c., since the property is changed by the award.

Where a sum of money is awarded, it is sufficient to set forth so much only of the award as to show a good cause of action. 1 Ld. Ray. 115; Bur. 278. But if there is any condition precedent, &c. to be performed by the plaintiff, it should be stated, and performance or a tender and refusal averred.

A verbal award may be set forth substantially. 2 Vent. 242.

If the plaintiff sets forth an award, though unnecessarily and on the face of the declaration, the award appears to be defective, it will be bad. 1 Sid. 160; 2 Lev. 6; Yelv. 98.

In setting forth an award it seems hardly safe to say, that "it was awarded *among other things*." See *Rich v. Morris*, 1 Mod. 36, where it was said to be bad, though there are authorities to the contrary. The words, "among other things," do not seem to be merely surplusage, though the declaration might have been good, if they were omitted. But on the face of the declaration it does not appear that the plaintiff has any cause of action, because the declaration acknowledges, that the award contains other things, which, if set forth, might show that the plaintiff had no right to recover. It would be better, therefore, in order to avoid the risk of a demurrer, to omit those words.

3. On Bonds.

In declaring on a Bond, it is best to describe it as a *writing obligatory*. This description is sufficient without more. Cro. Eliz. 737. Mo. Cas. 306. See Salk. 463. But to describe it merely as a writing, signed by his hand, is bad. Cro. Car. 209.

The plaintiff may declare upon several bonds in the same declaration. Com. Dig. Action (G.) The second count may begin thus; "And for that the said D, on &c., at &c., by his other writing obligatory," &c. In such case the conclusion should be omitted to the first count, and after the second count a general conclusion may be subjoined thus: "which said several sums of money amount together to the sum of \$—"; "yet the said D," &c.

The Bond must generally be pleaded with a profert, but if it is in the hands of the other party or is lost by accident, or destroyed by fire, it will be sufficient to state the fact according to the truth, in the declaration, and it will be a sufficient excuse. Without profert or a sufficient excuse for want of it, the plaintiff will be nonsuited. If the bond be found afterwards, it will be sufficient, if the excuse were true at the time. See 2 Chitty's Pleadings, 191.

These averments may be made thus, "and which said writing obligatory having been lost, &c., or destroyed by accident, &c., or being in the possession of the said D, the plaintiff cannot produce the same to the said court." See 3 T. R. 151; 2 Camp. 557; 4 East's R. 585.

If an action is brought on a bond, made according to the custom of some countries, with a scroll seal, it is recommended to declare; 1. As on a writing obligatory, in common form. 2. As on a writing obligatory made according to the custom of the country. 3. Introduce the common counts to include the original consideration. 3 Chitty's Plead. 240.

A Bond, conditioned for the payment of a smaller sum, carries interest from the day of payment; if no day of payment is expressed, from the day of execution, the bond being due on that day. 7 T. R. 124. *Aliter* of a single bill. Starkie on Evidence, Part 4, 309, *cites* Starkie's Cases, 291; 1 B. & P. 337.

DECLARATIONS ON BONDS.

On a bond in common form.

In a plea of debt, for that the said S, on &c., at &c., by his writing obligatory of that date, sealed with his seal, and here in court to be produced, bound and acknowledged himself to be indebted to the plaintiff in the sum of \$—, to be paid to the plaintiff on demand; yet though requested, the said S hath never paid the same to the plaintiff, but wholly refuses and neglects so to do. SPRAGUE.

On a bond without date.

For that the said S, by a certain writing obligatory, made and sealed, and as the deed of the said S, on &c., at &c., delivered to the plaintiff, which is here in court to be produced, acknowledged himself to be bound to the plaintiff in the sum of \$100, to be paid to him on demand; yet, though often requested, he hath never paid the same, but refuses so to do. 2 Ins. Cler. 330.

On a bond given to two; by survivor.

For that the said S, on &c., at &c., by his writing obligatory of that date, sealed with his seal, and in court to be produced, acknowledged himself to be bound to the plain-

tiff and one L L, now deceased, whom the plaintiff survived, in the sum of \$—, to be paid to the plaintiff and the said L L, or either of them, when thereto requested; yet the said S, though often requested, never paid the same sum to the plaintiff or the said L L, or either of them, in the lifetime of the said L L, or to the plaintiff since the decease of the said L. L., but refused and still refuses to pay the same.

On bond given to wife after marriage; by husband.

For that the said S, on &c., at &c., by his certain writing obligatory of that date, sealed with his seal, and in court to be produced, bound himself in the sum of \$100, to be paid to L L, then and yet the wife of the plaintiff, on demand; yet, though often requested, he hath never paid the same to the said L L or to the plaintiff, but wholly refuses so to do. 3 Lev. 403; 1 Vern. 396; 4 T. Rep. 616.

By husband and wife, on bond to wife before coverture.

For that the said S, on &c., at &c., by his bond of that date, sealed with his seal, and in court to be produced, bound himself to the said L L, then sole, by the name of L L, of &c., in the sum of \$100, to be paid to the said L L on demand; yet, though requested, the said S never paid the same to the said L, while sole, nor to the plaintiffs, or either of them, since their intermarriage, but to pay the same to the said L L, while sole, or to the said plaintiffs, after their intermarriage aforesaid, refused, and still refuses. 2 Ins. Cler. 377.

By administrator or executor, on bond given by an intestate; against his executor or administrator.

For that the said E E, (the intestate) at &c. aforesaid, on the — day of &c., by his bond of that date, sealed with his seal, and in court to be produced, bound himself to the said B B, (the testator,) then living, in the sum of \$100, to be paid him on demand; yet the said E, though requested in his lifetime, never paid the same to the said B B in his lifetime, nor to the plaintiff, since the death of the said B B; nor hath the said D, though likewise requested since the death of the said B B and E E, ever paid the same but detains it. *Dana v. Dean.* F. DANA.

Another. — By executor or administrator against administrator or executor.

For that the said D, on &c., at &c., by his writing obli-

gatory of that date, sealed with his seal, and in court to be produced, bound himself to the said A A, then living, in the sum of \$100, to be paid him on demand; yet, though requested, the said D never paid the same in his lifetime; nor hath the said B B, since his decease, paid the same to the said A A in his lifetime, nor since his decease, to the plaintiff; but wholly neglected, and still neglects so to do.

Against an heir, on bond given by executor payable by instalments.

Summon &c. T, son and heir of R R, late of &c.; for that the said R R in his lifetime, on &c., at &c., by his writing obligatory of that date, sealed with his seal, and in court to be produced, acknowledged himself to be bound unto the plaintiff, his heirs, executors, and administrators, in the sum of \$100, to be paid in the following manner, to wit, the sum of \$50, part thereof, on &c., and the residue thereof in full, on &c.; and for the true payment thereof, bound himself, his heirs and executors, &c., in the sum of \$200, firmly by said writing obligatory. And the plaintiff avers, that the said R R, in his lifetime, or the said T, son and heir of the said R R, after his death, did not pay to the plaintiff on the said — day of &c., in the said bond above specified, the said sum of \$50, which ought to have been paid to the plaintiff on that day, according to the form and effect of the said bond; whereby an action hath accrued to the plaintiff to demand, and have of the said R R in his lifetime, and of the said T, after the death of said R R, the sum of \$200; yet, &c. *See ante Introduction, chap. 9.*

Against an heir and a devisee of the obligor.

Summon C E of &c., Esq., son and heir of G H of &c., deceased, and E F of &c., yeoman, devisee of the said G H, as appears by his last will, duly proved, approved, and allowed, &c. (*make profert of a copy*;) for that whereas the said G H, of whom the said C E is heir, and the said E F is devisee as aforesaid, in his lifetime, viz. on &c., at &c., by his certain writing obligatory, sealed with his seal, and in court to be produced, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of \$—, to be paid to the plaintiff when he, the said G H, should be thereunto requested, and for which payment well and truly to be made, the said G H did, by the said writing obligatory, bind him-

self and his heirs to the said plaintiff; nevertheless, the said G H, in his lifetime, and the said C E, his heir, and the said E F, devisee as aforesaid, though often requested so to do, have not, nor hath either of them as yet paid the said sum of \$—, or any part thereof, but have wholly neglected and refused, and the said C E and E F still neglect and refuse to pay the same or any part thereof to the said plaintiff. *This precedent refers to the Mass. Stat. 1788, chap. 66, sect. 3, 4, 5, and Stat. 1791, sect. 1 and 2.*

Against husband and wife, on a bond given by her before coverture, to the Judge of Probate.

For that whereas the said E, while she was sole, and before her intermarriage with the said D, to wit, on &c., at &c., by her then name of E E, of &c. widow, by her certain writing obligatory, sealed with her seal, and in court to be produced, held, and firmly bound herself to the plaintiff by the name of B B, Esq. judge &c. in the full sum of \$100, to be paid unto the plaintiff, his successors in office, or assigns, when she should be thereto requested; yet the said E, while sole, and the said D and E, since their intermarriage, or either of them, though often requested, have not paid the same sum; but they and each of them wholly refuse so to do.

S. PUTNAM.

NOTE. Under the Revised Statutes of Massachusetts, ch. 70, sec. 10, suits on bonds of administration must be brought in the S. J. Court for the county where the bond is taken.

By Section 3, any creditor may sue for his own benefit, after recovering judgment against the executor, &c. for his debt, and a demand and refusal of satisfaction of the same, &c.

By Section 4, if the estate is insolvent, such suit may be brought by any creditor, after the amount due him has been ascertained by the decree of distribution, and a demand and refusal.

By Section 5, such suit may be brought by any of the next of kin, to recover his share of the personal estate, after the amount is ascertained by a decree of the Probate Court, and a demand and refusal.

By Section 6, *on a representation to be made to the Judge of Probate*, by any person interested in the estate, that the executor, &c. has failed to perform his duty in any other particular than the preceding, *the judge may authorize* any creditor, next of kin, legatee, or other person aggrieved by such mal-administration, to bring an action on the bond.

By Section 7, in *all* the preceding cases the writ shall be indorsed by the persons for whose benefit, or at whose request, the action is brought, or their attorney, who shall be liable for the costs, &c., and when the suit is brought for any creditor or next of kin, &c., there shall be a further indorsement that the action is brought for such creditors, or next of kin.

The manner of awarding execution is pointed out in section 10 of the same chapter.

Under Rev. Stat. of Mass., ch. 68, sec. 25, if any executor, &c. neglects to settle his accounts in the Probate Court, within six months after the commissioners' return, &c. &c., such neglect shall be deemed a breach of the administration bond, &c.

In *Barton v. White*, 21 Pick. 58, the court held, if an administrator on an insolvent estate neglects to render his account for more than six months, after the report of the commissioners, a creditor, whose claim has been allowed, and who has made a demand on the administrator, must sue the bond, in the name of the Judge of Probate, for the benefit of all parties interested.

Against surviving obligors in a probate bond, in the name of the successor of the Judge of Probate, to whom given.

To answer unto S S, of &c., Judge of Probate of wills, and granting administrations within the county of &c., in a plea of debt; for that the said D and the said E, with one C C, since deceased, on &c., at &c., by their bond of that date, sealed with their seal, and in court to be produced, bound themselves unto A A, Esq. then Judge of Probate of wills &c., within said county of &c., in the sum of \$1000, to be paid to the said A A, Esq. or his successors, on demand. And the said B B has succeeded to the said office, and is a successor of the said A A, Esq. therein, and hath been duly appointed thereto; yet, though requested, said D, and E, and C, or either of them in the lifetime of said C, or the said D and E, or either of them after the decease of said C, never paid the same sum of \$1000 to the said A A, Esq. while in said office, or to any of his successors therein, or to the said B B; but they and each of them have neglected, and still neglect so to do. See 2 *Ins. Cler.* 311.

S. SEWALL.

On a bond given to the treasurer of a town.

For that the said D on &c., at &c., by his writing obligatory of that date, sealed with his seal, and in court to be produced, bound himself to C C, then treasurer of the town of &c., and his successors in office, in the sum of \$200, to be paid to the said C C, treasurer as aforesaid, or his successors in said office on demand; yet the said D, though requested, while the said C C was treasurer as aforesaid, never paid the same to the said C C; nor hath the said D ever paid the same to the plaintiff since that time, or to any of his predecessors in office, but wholly neglected and still neglects so to do.

4. On Legacies.

In declaring for a legacy against executors, the plaintiff should set out, 1. The will and the bequest therein to the plaintiff. 2. The appointment of the executors. 3. The death of the testator, with an allegation that he died seized or possessed of property sufficient to pay all his debts, legacies, &c. 4. The probate of the will, with profert of an authenticated copy. 5. The acceptance of the trust, by the executors sued, (and the refusal to accept, by those left out in the action, if any,) and their assent to the legacy. 6. An allegation, that the time of payment has arrived, and that the conditions have been performed, &c., so that it may appear that the legacy has become payable, according to the true intent of the will. 7. A conclusion that an action hath accrued to demand and recover the legacy, &c.

In declaring for a legacy, against a devisee of land charged with the payment of it, the plaintiff should allege, 1. That the testator was seized of the land devised. 2. That he made his will, in which he devised the land to the devisee, subject to the payment of the legacy, and setting forth the devise and legacy as in the will. 3. That the testator died seized of the land. 4. The probate of the will, with profert of an authenticated copy, though in some precedents profert is omitted. 5. The assent by the devisee to the devise of the lands, and entry by him into them. 6. An allegation of all facts, necessary to show that the legatee is entitled to receive payment of the legacy, at the time of bringing the action; such as, that he had arrived at twenty-one; or that he or she was married; or that he had performed all the conditions precedent, if any; or that the contingencies, if any, upon which payment depended, had happened, &c. 7. The conclusion, that an action had accrued, &c.

DECLARATIONS FOR LEGACIES.

(See *Assumpsit*, p. 188.)

Against executors (some declining the trust,) for a legacy, &c.

1st COUNT. *On the will.*

For that the said G B (testator,) in his lifetime, at a place called L, to wit, at P aforesaid, on &c., made his last will and testament, in due form of law, and therein and thereby, among other things, bequeathed to his daughter L, one of the plaintiffs, and to his daughters A and S, and to his son V, the interest of £4000 sterling of Great Britain, of the value of \$—, during the life of the aforesaid D, then the testator's wife; the said sum being part of a bond due to the said G, from J, L, and F. And the said G further ordered and directed in his said will, that the said interest, which the plaintiffs aver is of the annual value of \$—, should be received by his said wife, for the use of his said daughters and son, during their minority, to be applied for their benefit in equal proportions, or for the benefit of the survivors or survivor of them; and that the said interest, or their respective parts thereof, should be received by his said three

daughters, after they should attain their age of twenty-one years, or days of marriage, with the consent of their mother. And the said G, in and by his said will, constituted the said D, E, F and G, and also one J L and one J C, executors of his said last will and testament. And the said G, afterwards, on &c., died possessed of the said bond, the same remaining unpaid and unsatisfied in any part; and also of a large personal estate, exclusive of the said bond, more than sufficient to pay all the debts the said G owed at his decease, and the legacies bequeathed in his said last will and testament, which was afterwards, at a place called L, to wit, at P aforesaid, on &c., duly proved, approved, and allowed, an authenticated copy whereof is here in court to be produced. And the said D, E, F and G, accepted of the said trust of executors aforesaid, and took into possession the personal estate aforesaid, including the said bond, and assented to the several legacies bequeathed in the said last will and testament, and in the codicil to the same, hereafter mentioned; the said J L and J C not having accepted of the said trust. And the plaintiffs further say, that the said V, the said G's son aforesaid, died at P aforesaid, on &c., in the lifetime of the said G, under the age of twenty-one years, without ever having had any issue of his body; and that the said L, one of the said G's daughters aforesaid, was, at the time of the said G's death, more than twenty-one years of age, to wit, of the age of twenty-five years; wherefore, by force of the said last will and testament, and of the premises, the said plaintiff and L, his wife, in her right, are entitled to one third part of one year's interest of the said sum of £—, amounting to £— lawful money, and an action hath accrued to the said plaintiff, and L his wife, in her right, to demand, recover, and have the same last mentioned sum of and from the said D, E, F and G; yet, though requested, they have not paid the same, but unjustly refuse so to do, and detain it.

2d Count. — On a codicil altering the time of payment, &c.

And for that the said G, in and by his said last will and testament, among other things, further bequeathed the said principal sum of £4000 sterling money, of the value of £— as aforesaid, after the decease of his said wife, unto his said three daughters and son Y, to be divided among them, or the survivors of them, share and share alike; and if only one survivor, then such survivor to take the whole. And

the said G, in and by his said last will and testament, ordered and directed that the said respective parts of his said daughters' legacy should be paid to them, when they should attain their respective ages of twenty-one years, or days of marriage, if they should marry with the consent of their mother; and that if any or either of his said three daughters, or son Y, should depart this life before their mother, leaving issue, such issue should be entitled to receive the proportion that would have belonged to his, her or their mother or father so dying. And the said G afterwards, in his lifetime, at a place called L, to wit, at P aforesaid, on &c., next after the making of the said last will and testament, made a certain codicil to the said last will and testament, in due form of law, and therein and thereby declared, that the respective parts aforesaid of his said three daughters and son, should be paid to them in twelve months, next after his, the said G's, ~~decease~~, they having attained their ages of twenty-one years, or his said three daughters, their days of marriage, with the consent of their mother as aforesaid; but if they should not attain their said ages of twenty-one years, or days of marriage, within twelve months after his, the said G's, decease, then the same should be paid to them in twelve months after they should attain their aforesaid ages of twenty-one years, or days of marriage; which said codicil was afterwards, at a place called L, to wit, at P aforesaid, at the same time the said last will and testament was proved as aforesaid, proved, approved, and allowed, as a codicil to and as a part of the said last will and testament; an authenticated copy whereof is here in court to be produced; by force whereof, and of the premises contained in this writ and declaration, the said plaintiff, and L, his wife, in her right, are further entitled to one third part of the said principal sum of £4000 sterling money, which third part is of the value of \$—; and an action hath also, by law accrued to the said plaintiff, and L, his wife, in her right, to demand, recover and have the same last mentioned sum of the said D, E, F and G; yet, though requested, they have not paid the same, but unjustly refuse so to do, and detain it; all which is to the damage, &c.

T. PARSONS.

Against husband and wife, the wife being devisee of land for a legacy payable one year after the death of the testator, and charged on the land.

For that whereas J S, late of &c., was on &c., seized

in his demesne as of fee, of a messuage wherein he dwelt, with the appurtenances, and one half acre of land, thereto adjoining, and of five acres of land, all in &c. aforesaid; and being so seized thereof, the same day at &c. aforesaid, made his last will and testament in writing, under his hand and seal, and thereby devised the said messuage and land to the said E, then named L C, and her heirs, she paying to the plaintiff the sum of &c. in a year after the decease of the said J S; and afterwards, on &c., at &c., the said J S died so seized of the said messuage and lands; which said last will and testament has been duly proved and approved.* And the said E, then sole, assented to the said devise, and then and there entered into the messuage and lands aforesaid, and thereby became chargeable to the plaintiff to pay him the aforesaid sum of \$—, according to the devise aforesaid; and the said F and E, his wife, still hold the premises devised as aforesaid; yet the said E while sole, or the said F and E, since their intermarriage, have not paid the said sum of \$—, devised to the plaintiff as aforesaid, though the said time of payment is long since past, and though requested; but unjustly detain it. BOLLAN.

Against executors for arrears of an annuity bequeathed by plaintiff during widowhood.

For that the said A B [testator,] on &c., at &c., was seized and possessed of a large real and personal estate, and there, on the same day, made his last will and testament in writing, in due form of law; and thereby, *amongst other things*, after payment of his debts, and funeral charges and expenses, gave and bequeathed to the plaintiff, then being his wife, the sum of \$— per annum during her widowhood, to be paid to her by his executors out of the yearly income of his estate; and appointed therein the said T executor thereof; and afterwards, viz. on &c., at &c., the said testator died so seized and possessed thereof, leaving estate sufficient to pay all his debts, funeral charges and expenses, and the said sum of \$— yearly out of the yearly income thereof. And the said last will and testament, afterwards, on &c., at &c., was duly proved and approved; and the said T accepted the trust of executor aforesaid, and took the said estate into his hands, and assented to the legacy aforesaid; and thereupon, at &c. aforesaid, became liable to pay the plaintiff the said sum of \$—, on &c. annually, from the

* If thought necessary, profert may be made here.

death of said testator, during her widowhood aforesaid, which still continues. And the plaintiff further avers, that on &c. last past, the sum of \$— of the said legacy for two years, ending that date, were behind and due to her; yet the said T never paid it, though requested; but unjustly detains it.

R. DANA.

Against devisee of lands, for a legacy payable to plaintiff at twenty-one or marriage, and charged on the lands. Devisee being co-executor with one G, &c.

For that whereas F, late of &c., was on &c., seized in his demesne as of fee, of a messuage &c., in &c., aforesaid, and being so seized thereof, on the same day, at the same place, made his last will and testament in writing, under his hand and seal, and thereby devised his said messuage to the said T and his heirs and assigns forever; he or they, *among other things*, paying to the said plaintiff the sum of \$— when he should arrive at the age of twenty-one years or should be married, whichever should first happen; and the said F therein appointed one G and the said T, his executors of his said last will and testament; and afterwards, on &c., at &c., died so seized of the devised tenements. And the said G and T thereafterwards, on &c., accepted of said trust of executors, and caused the said last will and testament to be duly proved and approved; and the said T assented to the said devise made to him as aforesaid, and entered into the said devised tenements, and thereby became chargeable to pay to the plaintiff the said sum of \$—, when he should arrive at the age of twenty-one years, or should be married, whichever should first happen. And the plaintiff in fact says, that he never was married, and that on &c. he arrived at the age of twenty-one years, whereof the said T, there on the same day, had notice, and thereby became chargeable to pay the plaintiff the said sum of \$—, on demand; yet, &c.

F. DANA.

Against executors for a legacy payable two thirds at testator's death and the rest at the decease of his wife.

For that whereas the said A, the testator, on &c., at &c., being then and there in full life, made his last will and testament in writing, and therein and thereby gave to the said plaintiff the sum of \$—, to be paid to him by the said T and E, the executors of his said will and testament, two third parts of said sum at the decease of the said A, the testator, and the other third part thereof at the decease of

his wife, and appointed the said T and E executors of his said will and testament. And the plaintiff avers, that F was wife of the said A, the testator, at the aforesaid time of his making his said will and testament, and that she hath survived him, and is yet in full life; and that after the making of said will and testament as aforesaid, to wit, on &c., the said A, the testator, died at &c. And afterwards, on &c. at &c., the said T and E before the Hon. B G, Esq., judge of probate of wills, and for granting administrations in said county of E, proved the said will and testament, and the same was then and there duly proved and allowed by, and before the said B G, judge, as aforesaid, and the said T and E then and there accepted the trust of executors thereof, and thereby became liable and chargeable in law to pay the said plaintiff the said two third parts of said sum of \$—, being \$—, on demand; and the other third part thereof, being \$—, upon and at the decease of the aforesaid wife, and now widow of the said A, the testator; yet the said T and E have not, nor have either of them, paid the plaintiff the said two third parts of said &c., nor any part thereof, although thereto requested by the plaintiff, on &c., and on divers other days before and since said &c., at &c.; but they neglect so to do; to the damage, &c. *Fellows v. Fellows, Essex, 1794.*

Against executors, by administrator of legatee, to recover the amount of legacy, payable in land, moveables, or money, at legatee's election, &c. Plaintiff elects to receive money.

For that, on &c., at &c., the said A made his last will and testament, and therein, *among other things*, gave the said M [plaintiff's intestate] \$—, to be paid her by his executors, in said will named, within a year after his decease, in land, moveables or money, at her election; and thereafterwards on &c., the said A died, and his will aforesaid was duly proved and approved, and the said B, [defendant's intestate] therein named, then and there accepted of the trust aforesaid, and received into his hands and possession more of said A's estate, than was sufficient to pay his debts and legacies given in and by his will; and the said M there, within the said year, made her election to have said \$— paid her in money, whereof the said B, the executor aforesaid, then and there had notice, and ought to have paid her the said \$— in money, within the said year; but the said B never paid the same, though requested; and he afterwards, on

&c., there died; and the said D afterwards, on &c., was duly appointed administrator on said A's estate not before administered, and then and there received into his hands and possession, more of said A's estate, than was sufficient to pay his debts and legacies aforesaid, then remaining due, together with the interest due thereon; and then and there had notice that the said \$— was never paid, and that said M had made her election to have it in money aforesaid; and the said D thereby became chargeable to pay the said \$—, with lawful interest for the same, from the expiration of the said year, and promised to do it accordingly; yet, &c.

Against executor, by husband and wife to recover a legacy given to her.

For that whereas, on &c., at &c., the said A made his testament, and thereby gave to said B, his daughter, then wife of the said C, the sum of \$—, to be paid by his executors, in &c. years after his decease, and appointed the said D, the son, executor of the testament aforesaid; and afterwards, on &c., the said A died, and on &c., at &c., the said D, before S H, late Judge of the probate of wills in the said county, proved the will aforesaid, and accepted the trust of executor thereof, and thereby became chargeable to the said C, and B, his wife, to pay them within — years after the decease of the said A, the said sum of &c.; yet, &c.

*Against executors for a legacy payable at twenty-one, or marriage, &c.
This declaration, alleging a promise, will answer for Assumpsit.*

For that the said T [the testator,] at &c., on &c., being then seized and possessed of a large real and personal estate, made his last will and testament in writing, duly executed, and therein, *among other things*, bequeathed to the said S, (then living) his daughter, by the name of S S, the sum of \$—, to be paid her on her marriage, or when she should arrive at the age of twenty-one years, by his executor in the said will named; and in and by his said will, appointed the said D executor of his said last will and testament; and afterwards, *viz.* on &c. at &c., died so seized and possessed thereof. And the said will and testament was afterwards, to wit, at &c. on &c., duly proved, approved, and allowed, and the said D then and there took upon himself the trust of executor of the said last will and testament; and then and there took and received into his hands and possession, a large estate, real and personal, which was the

said testator's at the time of his decease, more than sufficient in value to pay all the debts the said testator owed at the time of his death, and the legacies bequeathed in his said last will and testament; and assented to the said legacy bequeathed to the said S as aforesaid; and thereby became liable, and in consideration thereof, then and there promised the said S, then sole, to pay her the said sum of \$—, according to the tenor aforesaid of the said bequest. And the plaintiff avers, that the said S arrived to the age of twenty-one years on &c., to wit, at &c., she being then sole, and having at that time never been married; of which the said D, thereafterwards, on the same day, had notice, and was requested to pay the said legacy of &c., to her: yet the said D never paid the same to the said S in her lifetime; nor has he, since her death, ever paid the same to the plaintiff, though alike requested, viz. on &c., at &c., but unjustly refuses so to do.

T. PARSONS.

5. Escapes.

(See ante, Case, p. 435, 436.)

By Statute, 1784, chapter 41, section 1, sheriffs are made liable for escapes happening through the insufficiency of a jail, or the negligence of the sheriff or the jailer, to the plaintiff, creditor, &c. By section 3, in case of a negligent escape, if the sheriff or jailer, &c. shall recover the prisoner within three months afterwards &c., he shall be liable for nothing more than the costs of any action that may have been commenced.

In Case, for an escape, the plaintiff recovers damages; in Debt, he goes for the whole debt upon which the debtor was committed. 1 Saund. 35, n. 1.

In chapter 97, Revised Statutes of Massachusetts, section 71, the action of Debt for an escape is abolished, in the case of a prisoner arrested or committed on execution in any civil action, whether the escape be negligent or voluntary. By sec. 72, the creditor in such case may have an action on the case, to recover the damages sustained by him.

In Debt, for an escape, it is necessary to set out the judgment and execution, and the commitment of the defendant thereon. 2 Lev. 390. But it seems unnecessary to set forth how the original debt became due, or the commencement and proceedings on the original action. Lut. 11. It was formerly held not to be sufficient to make a recital of the recovery of judgment, and that it was necessary to allege directly, "that the plaintiff recovered," &c. But it was held otherwise in Cro. Elizabeth, 877, and the latest precedents commence, "for that whereas," &c.

It is recommended always to declare for a voluntary escape; because evidence of a negligent escape will be admitted under it. 2 T. R. 216. And the sheriff will not be allowed to plead a fresh pursuit. Com. Dig. Escape, E. After a voluntary escape, the officer has no right to re-

take the prisoner, so that it seems he could not avail himself of the provision, in case of recovering the prisoner, within three months, in the Stat. 1784. *Quære.*

DECLARATIONS IN DEBT FOR AN ESCAPE.

Against Sheriff for an escape on execution.

For that whereas the plaintiff, by the consideration of the justices of our S. J. C., holden &c., within &c., on &c., recovered judgment against one M M for the sum of \$120 damages, and costs of suit, as by the records of said court remaining appears; and afterwards, to wit, on &c., the plaintiff, for the more speedy obtaining thereof, prosecuted out of the clerks office of said court, a certain writ of execution for the same, in due form of law, against the said M M, directed to the sheriff of said county &c., or his deputy, and returnable into said court, on &c.; which said writ afterwards, and before the return thereof, to wit, on &c., was delivered to the said D, then being sheriff of said county of &c., to be executed in due form of law, by virtue of which said writ the said D, so then being sheriff as aforesaid, afterwards, and before the return thereof, to wit, on &c., at &c., took and arrested the said M M, and then and there had him in his custody in execution, for the damages and costs aforesaid, until the said D thereafterwards, to wit, on the same day, then and there being sheriff as aforesaid, permitted the said M M, against the will of the plaintiff, to escape out of his custody and go at large wherever he would, the plaintiff then, and yet, not being satisfied of the said damages and costs; *whereby an action hath accrued to the plaintiff to have and demand of the said D, the said sum of \$120; yet the said D, though often requested, has not yet paid the same to the plaintiff, but hath wholly refused and still refuses. See 1 Saund. 33; 2 Saund. 98. See the notes in the same places.*

NOTE. By substituting in the beginning of this declaration, "in a plea of trespass on the Case," in lieu of, "in a plea of Debt," and ending it with the words, "*by reason whereof, the plaintiff has wholly lost all benefit of the above recited judgment,*" &c., instead of those in italics, this will answer for a declaration in Case under the Revised Statutes.

6. For Rents.

In reciting a lease, it is necessary to set it forth accurately, according to its legal effect; a misrecital will be a fatal variance. The declara-

tion should show where the lands lie ; but it is not necessary to be more particular or certain than the lease itself. 2 Cro. 124 ; Salk. 562.

Where the lessor sues the lessee, on a lease for years, it is not necessary to allege an entry or occupation of the land demised, for the lessee is bound to pay, whether he enters or not ; but if the lessee is merely tenant at will, it is said to be necessary to set forth an entry and occupation, on account of which alone he is chargeable, and how long he occupied. Salk. 209. However, it is held, that *Debt* will lie for use and occupation generally, without setting forth the particulars of the demise. 6 T. R. 62.

In declaring for rent payable quarterly, &c., the plaintiff may sue for each periodical sum, as soon as it becomes due ; but he cannot sue for any part of such periodical sum without showing that the rest is satisfied, or that he has a right to apportion the rent. Where the lessor sues the lessee, he grounds his action on the contract, and the action is transitory, and may be brought in any county that is consistent with statute regulations. But where the lessor sues the assignee of the term, or the executor of the lessee, and where the assignee of the lessor sues the lessee or his assignee, the action is grounded merely on privity of estate, and must be brought in the county where the lands lie. See 1 Wils. 165 ; 2 Salk. 651 ; 2 Stra. 776. If the plaintiff sues as assignee of lessor, he should show a good assignment *by deed*. 3 Lev. 155 ; Stra. 814 ; Ld. Ray. 1536 ; 1 Saund. 112. For here the assignment cannot be good without deed. In strictness, the plaintiff should show expressly what rent is reserved, and when it became due. 1 Salk. 139 ; Cro. Eliz. 262.

It seems an under lessee cannot be sued in Covenant, nor even in Debt, on the lease, since there is neither privity of contract nor of estate between the original lessor and him, to sustain the action. Cowp. R. 766.

By ch. 60, Rev. Stat. of Mass. sec. 22, " Every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised." By section 23, such apportioned rent may be recovered in an action of Debt, &c.

It seems, if rent is payable quarterly, but the lessor dies before the quarter expires, even on the morning of quarter day, the rent goes to the heir and not to the executor ; there is no apportionment of the rent between them, because the rent is incident to the reversion ; neither will the heir be held to account for it, if the estate should prove to be insolvent.

DECLARATIONS IN DEBT FOR RENT.

For rent by deed.

In a plea of debt ; for that the plaintiff on &c., demised his dwellinghouse and garden, situate, &c., to the said A [defendant,] to hold and occupy for one year from that time ; in consideration whereof, the said A, by his deed, dated &c., at &c., in court to be produced, covenanted to pay to the plaintiff, the sum of \$— rent, at

four quarterly payments; whereby the said A, on &c., at &c., became indebted to the plaintiff in the same sum, rent as aforesaid, for the year then ending; yet, &c.

W. READ.

For rent on a parol lease, against husband and wife.

For that the plaintiff, on &c., at &c., demised to the said B, then sole, and called A B, his shop, &c., situate, &c., to hold for one quarter of a year, and so from quarter to quarter of a year, so long as both parties pleased, paying the plaintiff the sum of \$—, rent for every quarter of a year, so long as she should hold the same tenements; by force whereof the said B entered into the tenements aforesaid, and held the same until &c., when the said B and C intermarried; and they have held the same tenements ever since their intermarriage; and the sum of \$— for said rent for three quarters of a year, ending &c., was then behind, and due to the plaintiff from the said B and C; yet, &c.

R. DANA.

For rent on indenture, by guardian.

To answer to P, guardian of A and B, both of &c., infants, and late guardian of C, of &c., which A, B, and C, are the children of S, late of &c. in a plea of debt; for that the said P, on &c. at &c., being guardian of all said children of the said S, by a certain indenture of that date, made between the said P, guardian as aforesaid, and the said T, one part whereof is in court to be produced, demised, and to farm-let to the said T, all that farm &c., to hold from that time until &c., yielding and paying the said P, at the expiration of said term, the sum of \$— for the rent of said tenements during that term of time; by force whereof, the said T entered into the same demised premises, and held the same during the term aforesaid; and at the expiration thereof, there was due to the said P, from the said T, the same sum of \$— for the rent of the demised premises; yet, &c.

For rent on a parol lease, to be paid quarterly.

For that the plaintiff, by parol lease, on &c., at &c., demised to the said T, a house and shop, situate in &c., aforesaid, to hold for one quarter of a year then next ensuing, and so from quarter to quarter as long as both parties should agree, yielding and paying the sum of \$— for every quarter he

should hold the premises so demised ; by force whereof, the said T then entered the premises and held them until &c., when the sum of \$— rent became due, and is still in arrear and unpaid ; whereby an action hath accrued to the plaintiff, to recover and have the same sum ; yet the said T hath never paid the same sum, but owes and unjustly detains it.

THACHER.

Another.

For that the plaintiff, on &c., at &c., by a parol lease, demised to the said T, a house and land, situated &c., to hold for one quarter of a year then next ensuing, and so from quarter to quarter as long as the plaintiff and the said T should agree, yielding and paying, at the expiration of every quarter she should hold the premises so demised, the sum of \$—; by force whereof the said T then entered into the premises, and held them until the — day of &c., when the sum of \$— for the rent of the same became due and still is in arrear and unpaid, whereby an action hath accrued to the plaintiff to recover and have the same sum ; yet the said T has never paid the said sum, but owes and unjustly detains the same.

For rent by heir of lessor.

To answer to A B of &c., Esq., son and heir of B B, late of &c., gentleman, deceased, in a plea of debt, for that the said B B, in his lifetime, viz. on &c., at &c., by a certain indenture, then and there made between the said B B of the one part, and the said D of the other part ; one part whereof is in court to be produced, the date whereof is the year and day last aforesaid, demised &c., unto the said D, his executors &c., all that &c., to have and to hold &c., unto the said D, his &c., from &c., for and during the full term of — years then next ensuing &c., yielding and paying therefor yearly during the said term unto the said B B, his heirs and assigns, the yearly rent of &c., in four equal quarterly payments, on &c., on &c., on &c. and on &c. as by the said indenture may more fully appear ; by virtue of which demise, the said D entered into the said demised premises, and was possessed thereof for the term thereof demised as aforesaid, the reversion thereof belonging to the said B B, his heirs and assigns ; and being so possessed, and the reversion thereof belonging as aforesaid, he, the said B B, afterwards, viz. on &c., at &c., died seized of

such his estate in the said reversion, at whose death the said reversion, with the appurtenances, descended to the plaintiff as son and heir of the said B B ; whereby the plaintiff became seized of the said reversion, with the appurtenances, and being so seized, and the said D being so possessed of the demised premises, with the appurtenances, the sum of \$— of the rent aforesaid, for one year ending on &c., became in arrear from the said D to the plaintiff, and still remains unpaid ; whereby an action hath accrued to the said plaintiff, to demand and receive of the said D, the said sum of \$— ; yet though requested, &c.

Against assignee of lessee for rent.

For that whereas heretofore, to wit, on &c., at &c., by a certain indenture, then and there made, between the said plaintiff of the one part, and one E F of the other part (the counterpart of which said indenture, sealed with the seal of the said E F, the plaintiff now brings here into court, the date whereof is the day and year aforesaid,) the plaintiff, for the consideration therein mentioned, did demise, lease, &c., to the said E F, his executors &c., all that &c., (*here follow the language of the indenture to the end of the reservation of the rent on which the action is grounded,*) as by the said indenture, reference thereto being had will more fully appear ; and the plaintiff in fact saith, that after the making of the said indenture, to wit, on &c., at &c., all the estate of the said E. F., in the said demised premises, by assignment then and there legally made, came to and vested in the said D ; whereupon and whereby the said D entered into the said demised premises, with the appurtenances, and became and was possessed thereof, to wit, at &c. aforesaid ; and although the plaintiff hath in all things, well and truly observed and performed all things in the said indenture, on his part to be performed and observed, yet protesting that the said D, since the assignment, hath not performed all things in the said indenture, on his part to be performed, the said plaintiff in fact saith, that after the said assignment, and during the continuance of the said term, and whilst the said D was so possessed of the demised premises as aforesaid, to wit, on &c., at &c., a large sum of money, viz. \$— of the rent aforesaid, for three years of the said term, ending on the day and year last aforesaid, became due from the said C D to the plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said in-

denture, by the said E F, in that behalf made ; by reason whereof an action hath accrued to the plaintiff to demand and have of the said D, the said sum of \$— ; yet though requested, &c.

7. On Judgments.

By the act of Congress, May 6, 1790, ch. 38, it is provided in substance, that the records of judicial proceedings of each state, shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state where such records are taken.

The settled construction of this section of the act is, that the judgment of a state court shall have the same credit, validity, and effect in every other court in the United States, which it had in the state where pronounced ; and that, whatever pleas would be good to a suit thereon in such state, and none other, can be pleaded in any other court in the United States. See the opinion of Chief Justice Marshall, in *Hampton v. McConnel*, 3 Wheat. 234. The law is laid down to a similar effect by Mr. Justice Story, in *Mills v. Duryee*, 7 Cranch, 481.

This simple proposition furnishes a principle, which serves as a master-key to unlock all the difficulties in relation to the efficacy, which shall be allowed to the judgment of one state, in the judicial tribunals of another. Suppose, for instance, A recovers judgment against B, in Massachusetts, and afterwards sues B on the judgment in New-York, of what pleas may B avail himself, supposing circumstances to bear him out? He may plead any plea that he might plead to a suit on the same judgment in Massachusetts : — as, 1. *No such record* ; this the plaintiff may answer, by replying and producing an exemplification of the record. 2. He may plead to the jurisdiction of the court before whom the original judgment against him was recovered ; as if the judgment in Massachusetts was rendered before a Justice of the Peace for a greater amount of damages than \$20, &c. Or he might show that he was not within the jurisdiction of the court, when the suit was commenced, or at any time afterwards ; in which case that part of his property only, which was within the jurisdiction at that time, and not his person, or his other property, would be bound by the judgment. 3. He might plead that the judgment was obtained against him by fraud, and that he never had any actual or constructive notice of the suit. 4. He might be allowed to show, that he had paid the judgment, &c., or that it was released, or satisfied by a levy, &c. These pleas, going to show, that the judgment was either void, or was satisfied, or released, he might plead in the courts of the state, where judgment was obtained, and consequently might avail himself of them, in any other court of the United States, where he happened to be sued. But he would not be allowed to object to or to inquire into the consideration, on which the judgment was originally recovered, as he *perhaps* would, in the case of a foreign judgment ; nor would he be permitted to show, that the court had decided wrong, supposing the merits of the case, and the person and the estate of the defendant to be within the jurisdiction of the court making the decision. For, these he could not plead or show, in an action

on the judgment, brought in the same court where the judgment was recovered. *Quære, &c.*

• See the following references; 9 Mass. R. 462; 4 Cranch, 442; 6 Wheat. 129; 1 Dal. 261; 15 Johns. 121.

Where suits on *foreign judgments* are brought, whether they are only *prima facie* evidence of a debt, or whether they are *conclusive*, except when liable to the objections of fraud, want of jurisdiction, &c. does not seem settled. See Mass. R. 273. See 1 *Starkie on Evidence*, p. 214, with the notes on these topics, by the learned editor, Mr. Metcalf.

DECLARATIONS IN DEBT ON JUDGMENT.

On judgment of Common Pleas.

In a plea of debt; for that the said plaintiff by the consideration of our justices of our court of C. P. held within and for our county of &c., on &c., recovered judgment against the said T by the name of T T, of &c., for the sum of \$100 damages, and \$10 costs of the same suit, as by the record thereof, now remaining in said court, appears; which said judgment is in full force, and not reversed, annulled, or satisfied; whereby an action hath accrued to the said plaintiff to have and recover of the said T, the said several sums of \$100, and of \$10, amounting in the whole to \$110; yet the said T, though requested, hath never paid the same, but wholly refuses so to do. F. DANA.

NOTE. If the action is on a judgment of a court in another state, say, "a copy whereof, duly authenticated, the said plaintiff here in court produceth." U. S. L. vol. 1, p. 115.

If judgment is satisfied in part, say, "which said judgment remains in full force and unsatisfied in part, to wit, for the sum of \$—, although our writ of execution hath issued thereupon, which is returned into our said court, satisfied in part only, to wit, for the sum of \$—, whereby an action hath accrued to the plaintiff, to demand and recover of the said T, the said sum of \$—, with the sum of &c. more for the writ aforesaid; yet the said T hath not paid either of the two last mentioned sums, though requested, but detains them." R. DANA.

On a judgment of the S. J. Court against administrator.

For that the said plaintiff, by the consideration of our justices of our S. J. Court, holden at &c., on &c., ["by adjournment from &c., then next preceding," *if so*] recovered judgment against the said B B, for the sum of \$1000 damages, and \$20 costs of suit, as, by the record thereof, in the same court remaining, appears; since which, the said B B is deceased, and administration of his estate is duly

committed to the said T, and the said judgment still remains in full force; and the several sums aforesaid are still due and unpaid; whereby an action hath accrued to the said plaintiff, to have and recover the same out of the estate of the said B B, in the hands of the said T, his administrator as aforesaid; yet though often requested, the said T hath never paid the same, but refuses so to do. TROWBRIDGE.

NOTE. If on justice's judgment, say, "for that the said A, on &c., at &c., before C C, Esq. one of the justices of the peace within and for the county of &c., by the consideration of said justice, recovered judgment against the said T for the sum of \$10 debt or damage, and \$2 costs of suit, as by the record thereof remaining, more fully appears," &c., [*as before.*]

Great care is necessary in setting forth the particulars of a judgment; for where there was a judgment for £288. 0s. 1d. and debt was brought for £288, omitting the penny, it was held to be a fatal variance, and not to be cured by a *remittit* of the penny, because the *remittit* should be before judgment. Strange's R. 1171.

Debt on Statutes.

Where a Statute is made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the Statute, or by implication. This action is considered as a remedial action, and not as a penal one, and the damages are considered in the light of a compensation for an injury sustained, and not as a penalty. 10 Co. 75, b; 2 T. R. 154. Where a penalty, or damages, is given, or a remedy provided by a Statute, in general terms, for a grievance, the party aggrieved alone shall have an action on the Statute for it, and without saying *qui tam*. 2 Inst. 486, 650; Mod. Cases, 26, 27.

Where a particular mode of redress, form of action, or manner of declaring is pointed out in a Statute, that must be strictly observed. But, where no particular form of action is designated, if the Statute gives *damages* to the party aggrieved, he may recover these in an action on the Statute, in the nature of an action on the Case, as for a tort; but, if a particular *penalty* is imposed by the Statute, it is more agreeable to analogy, to bring an action of Debt.

If a Statute gives a penalty to every one who will sue, a *qui tam* action lies by the informer. 2 Lev. 237. But a common informer can sue on his own account, only where that privilege is given him by the Statute, in express words, or by necessary implication. Stra. 828; 5 East's R. 313. In such case, the person who first commences a popular action, attaches a right in himself, which no subsequent suit can divest. 6 Johns. R. 102.

Of the nature of a qui tam action.

A *qui tam* action is the suit of the informer, and therefore he may be nonsuited. 3 Lev. 396; Lutw. 196. If the informer die after verdict,

his executor or administrator shall have judgment for his moiety. Hard. 161. It is discretionary with the court to permit a penal action, brought by a common informer, to be compounded. 1 Wils. 79. But it seems otherwise in a *qui tam* action, brought by the party aggrieved, without whose consent it cannot be done. It is a general rule, in compounding penal actions, to require the part of the king, people, &c., to be first paid, unless there appear some special circumstances to the contrary. 10 Johnson's R. 118; 4 Bur. 1929; 2 Black. R. 1154. Under favorable circumstances a penal action may be compounded *after verdict*. 1 B. & P. 18. If process is not sued out within the time limited by the Statute, no Debt vests in the informer, and therefore the defendant is not obliged to plead, that the time limited has expired. 3 T. R. 11. In actions on penal Statutes the defendant may pay the penalty into court with costs. Bul. N. Prius, 197.

Of the manner of declaring in actions on Statutes.

If a Statute gives a remedy, for a matter which was actionable at common law, without expressly or by necessary implication, taking away the common law remedy, the action may be brought either at common law, or on the Statute. 2 Inst. 200. If, in such case, the informer, or plaintiff, means to rely on the Statute, he must recite so much of it, as is necessary to show the grounds of his action, if it is a private Statute; or, if it is a public one, he must refer to it, otherwise it will be a waiver of his remedy on the Statute, and he will be obliged to rely on his remedy by the common law, or fail in his action. It was usual anciently to set out the Statute, on which the action was grounded, although a public one, of which the courts were bound to take notice without pleading, but even then it was not held necessary to rehearse any more than sufficient, to show on what the plaintiff grounded his action, or which was applicable to the matter in question. And accordingly, it was held sufficient to say, "that it was, among other things, enacted," &c. Com. Digest, (2 S. 3.) But now it is held inexpedient to recite any part of a public Statute, as a misrecital is always dangerous; and, if in a material part, it is usually fatal; especially if the declaration concludes, with referring to the Statute so erroneously rehearsed, by saying, "contrary to the form of the Statute aforesaid." If, therefore, it is thought expedient to recite any part of the Statute, the declaration should always conclude with, "contrary to the form of the Statute in this case made and provided;" for these words will aid the declaration, and any public act (if there be any) which furnishes a foundation for the action, will be considered as referred to; and the misrecital of the Statute will be rejected as mere surplusage. Lut. 140; Com. Dig. Pleader, (2 S. 10.)

So also, where the action is sustainable at common law, and the declaration concludes, "against the Statute or Statutes," &c., and the Statutes have been misrecited, or incorrectly referred to, or there is no Statute in fact, in relation to the subject, those words in the declaration shall be rejected as surplusage, and the action shall be maintained at common law. See Salk. 212; Comyn's Digest, Action upon Statute (C.)

If a Statute creates a new offence, of which the common law takes

no notice, it must be referred to in an action grounded upon it. An omission will be fatal even after verdict.

If the action is grounded on several statutes, to say, "against the form of the statute," is bad.

So if it is grounded on one statute, and the declaration concludes, "against the form of the statutes," it will be bad. But if there are two statutes, the latter of which is merely explanatory of the former, to say, "against the form of the statute," will be good.

It should appear in the declaration, on reference to the statute, that the act or the omission complained of, constitutes the offence prohibited or contemplated in the statute. If there is any exception, in the clause which declares or defines the offence, it must appear, by averment or otherwise, that the defendant is not within such exception. But if the exception is in any other section, by way of proviso or otherwise, it is not necessary to notice it in the declaration; and the defendant, if he would have the advantage of the exception, must set it forth in his plea and show himself within it. 1 Term R. 141, 320; 6 Term R. 559; 1 Lord Raymond, 120; 5 Taunt. 2; 4 Johns. R. 194; 13 Johns. R. 428.

In setting forth the grievance or injury against which the statute is provided, it is not only the safest, but much the easiest way to adopt the language of the statute itself. There is less danger of mistaking the sense, and an inaccuracy of expression which is copied from a statute, will be viewed by the court with much more indulgence, than if originating with the pleader himself. The former, however inaccurate it may be, if intelligible at all, must be respected and observed by the court; otherwise the statute is virtually repealed; but the latter will usually be fatal, as not showing that the act complained of, is within the purview of the statute.

With regard to the manner of naming the plaintiff in the declaration, it should be observed, that where a penalty is given to a party grieved, he may sue in his own name, describing himself merely as he would do in a common action of Debt. This remark also applies where the whole penalty is given, "to him who shall sue for the same." He, too, declares in Debt as in common form. But where half only of the debt is given to him who will sue for the same and the rest to the poor of a town, or to the use of the commonwealth, &c., it is necessary that this party in interest, should be described in the declaration, with all convenient certainty.

In *Mitchell v. Tibbets*, 17 Pick. 298, it was held, that the court may allow amendments in *qui tam* actions. In that case, the declaration, in one count, claimed a number of penalties, for distinct violations of a statute, and the court permitted the plaintiff to amend, by filing separate counts for each violation.

In what county the action on a penal or remedial statute shall be brought.

By Statute 1788, ch. 12, sec. 2, all actions on the behalf of any informer, or on the behalf of the commonwealth and any informer, must be brought in the county where the offence was committed. Otherwise the plaintiff or informer must be nonsuited. Whether this statute extends to an action brought on a statute by the aggrieved party, does not seem clear. Under the Statute, 18 Eliz. 5, making a provision

nearly similar, a party aggrieved was held not to be obliged to commence his action in the particular county where the grievance was committed, though a common informer was under that necessity. 1 Salk. 130.

By the Revised Statutes of Mass. when any forfeiture is recoverable in a civil action, the action shall be brought in the county where the offence is committed ; if it appears on trial, that the action is brought in a wrong county, the verdict shall be found for the defendant. Chap. 90, sec. 17, 18.

DECLARATIONS IN DEBT ON PENAL STATUTES.

For occupying a building as a livery stable, in a part of the town, being a maritime town, without the direction of the selectmen.

To answer to A B, of A &c., Esq., who sues this action, as well for the poor of the said town as for himself, in a plea of Debt, for that the said S, on &c., at &c., occupied and improved a certain building, in a certain part of the said town of A, the same being a maritime town of this commonwealth, to wit, on — street so called, for the business and employment of a keeper of a livery stable, and has continued to occupy and improve said building, as a livery stable, and for the business and employment appertaining thereto, and has been the keeper thereof ever since the said first day of —, to the day of the purchase of the plaintiff's writ, and including the day of the purchase thereof, in a part of the said town of A, to wit, on — street, being a part of the said town, in which the selectmen of said town, or the major part of them, had not at any time heretofore, directed and determined that the said building might be occupied and improved as a livery stable, and for the business and employment relating thereto ; contrary to the form of the statute in such case made and provided ; and the plaintiff avers, that the said S so occupied and improved the building aforesaid, for the business and employment of a keeper of a livery stable as aforesaid, for the space of two months ; whereby, and by force of the statute in such case made and provided, the said S has forfeited the sum of \$50 for every month he so occupied the said building as a livery stable, as aforesaid, and amounting in the whole, to the sum of \$100, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to demand and recover of the said S the said sum of \$100, one third part thereof to the said plaintiff's own use, and the other two third parts thereof to the use of the

poor of the said town of A ; yet the said S, though often requested, has never paid the same, but unjustly *detains it*, to the damage of the plaintiff, (who sues as aforesaid.)

NOTE. It should be, *owes and detains, &c.*, or *wholly refuses so to do*, as in Assumpsit.

Qui tam, for a penalty for carrying an apprentice to sea without consent of master, under stat. 1784, ch. 72, sec. 11.

For that whereas, by a certain act made by &c., entitled &c., it is enacted, that every master, &c., [*reciting the clause verbatim ;*] yet the said T, notwithstanding the act aforesaid, on &c., being then bound on a fishing voyage to Cape Sables, at M aforesaid, took and received an apprentice of the plaintiff, named &c., under the age of twenty-one years, on board the schooner called &c. whereof the said T then and there was master, bound out to Cape Sables on a fishing voyage as aforesaid, and immediately set sail in said schooner, and carried and transported out of this government the said apprentice therein, without the consent of the plaintiff, his master, as aforesaid, against the form of the act aforesaid, by reason whereof, and by force of the statute in that behalf made and provided, the said T hath forfeited the sum of \$—, one moiety to the use of this government, and the other moiety to the plaintiff, who sues, as well for this government as for himself ; yet the said T, though often requested, refuses to pay the same. OVERING.

NOTE. The statute makes use of the word, "government ;" otherwise it would have seemed more proper to have said "commonwealth." Probably, however, either will answer. For if "this government" means "this commonwealth," then it is obviously sufficient ; but, if "this government," does not mean "this commonwealth," then the words must be senseless and inoperative.

For money had and received to the plaintiff's use, under the gaming act, to recover back money lost at play. This action is in Assumpsit.

For that whereas the plaintiff, on &c., at &c., played with the said R at a game of cards, called &c., and the said R, at the said time, won of the plaintiff at said play, the sum of \$—, contrary to an act of this commonwealth, entitled "an act to prevent gaming for money or other property." And the plaintiff then and there paid the said R the sum so lost ; whereupon the plaintiff saith, that the said R, at &c., aforesaid, received the said sum for the use of the plaintiff,

and that, according to the form of the aforesaid act, an action accrues to the plaintiff to sue the said R for the said sum, and to recover the same of him; yet the said R, though requested, hath not paid the said sum, but wholly refuses so to do. See 1 *Lilly*, 168. GRIDLEY.

Qui tam, for a penalty for gaming. In an action of Debt.

FIRST COUNT, FOR MONEY. For that, on &c., at &c., the said R received to the use of the plaintiff and the poor of the said town of S, — shillings, being so much *money* lost by one J W, a minor and servant of the plaintiff, to the said R, more than three months next before the commencement of this suit, by gaming and playing at cards with said R, and which money so lost, was then and there paid to the said R, the winner thereof; and the said J W hath commenced no suit therefor, whereby, and by force of an act &c., made &c., entitled &c., an action hath arisen to the plaintiff, according to the form of said act, to demand and recover of the said R the said sum of — shillings and &c., being treble the value thereof, amounting in the whole to &c., one moiety thereof, to the plaintiff's own use, and the other moiety to the use of the poor of the said town of S.

Another Count. For treble the value of goods lost at gaming.

And for that, on &c., at &c., the said R took and converted to his own use, a watch &c., all of the value of &c., and being, until said conversion thereof, the proper goods of one J W, which he lost to said R, at &c., on the same day, being more than three months next before the commencement of this action, by gaming and playing at cards there, with said R, and which goods, so lost, were then delivered and paid to the said R, the winner thereof; and the said J W hath commenced no suit therefor; whereby, and by force of an act &c., made &c., entitled &c., an action hath accrued to the plaintiff, according to the form of said act, to demand and recover of the said R the said sum of \$—, together with the sum of &c., being treble the value of said goods lost as aforesaid, amounting in the whole to the sum of \$—, one moiety thereof to the use of the plaintiff, and the other moiety thereof to the use of the poor of said town of S; yet, though requested, the said R hath not paid the said sums, or either or any of them, but refuses so to do; to the damage of the plaintiff, who sues, &c.

W. PYNCHON.

NOTE. In *Lynall v. Longbotham*, 2 Wils. 36, the declaration only stated, that the plaintiff lost the money to the defendant, "by betting on the side of one J. C., at a certain game called a foot race;" and on argument the court adjudged that the declaration should have stated, that the said J. C. was *playing* at the game; for the statute was *penal*, and therefore judgment was for the defendant. *Quære*, if in the above declarations the name of the game should not be added? See Stra. 493.

For money lost at gaming and penalty also.

For that one C of &c., on &c., at &c., played with the said R, at a game of cards, called &c. And the said R then and there, at the said play, won of the said C the sum of \$—, contrary to an act of this commonwealth, entitled, "an act to prevent gaming for money or other property." And the said C then and there paid the said R the said sum so lost but has not prosecuted him, the said R, for it or the value thereof, nor received the said sum, nor the value thereof, from the said R; whereupon the plaintiff saith, that the said R, at &c., on &c., *received the said sum of \$— to the use of himself the said R*;* wherefore, and by the law aforesaid, an action hath accrued to the plaintiff to sue the said R for that sum, and the same to recover of him, and further to sue for and recover of him, the said R, the further sum of \$—, to be disposed of as the aforesaid act directs; yet the said R hath never paid the said sums, or either of them, though requested &c.; to the damage of the plaintiff, who sues as aforesaid, &c.

For a penalty for not making a sufficient passage for shad and alewives to pass up.

For that the said D and E, since the month of &c., did erect and build a dam in H aforesaid, across a stream there commonly called and known by the name of West River, or Little River, being a stream where the salmon, shad, and other fish, before and until the building of the dam aforesaid, usually passed up into their natural ponds above, to cast their spawn; but the said D and E, or either of them, never made a sufficient passage-way for the fish to pass up said stream, either through or round said dam; nor did they keep open any passage-way, for the free passage of the fish up the stream aforesaid, from &c., to &c.; by reason whereof, the said fish, during all that time and season, were wholly prevented from passing up the stream aforesaid, contrary to

* *Quære*. Under the statute should not this be, "to the use of him, the said C," (the loser of the money)? The statute enacts, that the loser may recover in an action for money had and received; but an informer must sue in Debt.

an act or law of [our province of the Massachusetts bay,] made &c., entitled, "an act in addition to an act made to prevent the destruction of the fish called alewives, and other fish;" whereby an action hath accrued to the plaintiff who sues as aforesaid, to have and demand of the said D and E, the sum of \$—, the one half thereof to the use of the poor of the town of H aforesaid, and the other half to himself; yet the said D and E, or either of them, have not paid it, though often requested, but unjustly deny to pay it; to the damage of the plaintiff, who sues as aforesaid, &c.

FARNHAM.

NOTE. This act, 15 G. II, is unrevised and unrepealed. It may be found in the Appendix to the edition of the laws (1800,) p. 1020.

Another.

For that the said D on &c., was, and ever since hath been, the owner and occupant of a certain mill-dam, long before that time made and erected across a certain stream, in &c., known by the name of &c., being a stream where the salmon, shad, alewives, and other fish usually passed up into their natural pond above, to cast their spawn; but the said D hath never made a sufficient passage-way for the fish to pass up the said stream, either through or round the said dam, from &c. to &c.; by reason whereof, the said fish during all that time and season, were wholly prevented from passing up the said stream, contrary to an act &c., entitled &c.; whereby an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of the said D, the sum of \$—, one half thereof to the use of the plaintiff, and the other half thereof to the use of the poor of the town of, &c.

R. DANA.

NOTE. Prov. Law, 15 G. II, ch. 14; M. O. C. L. 327, unrepealed; APPENDIX to the Mass. Laws, (Edition 1800,) 1020.

For a penalty for taking fish at unlawful places and times.

For that the said C, on &c., at &c., did take divers, viz. three alewives, and also did there, on &c., take divers other alewives, to wit, thirty alewives, in a certain stream which empties itself into Ipswich bay, so called, in said &c., not in the proper place or places, upon the said stream appointed, on &c., last past, for taking alewives and other fish that usually pass up the said stream, to their natural ponds, to cast their spawn, by the person, appointed in said town of &c., to see that the passage-way

for alewives and other fish be kept open ; and not on any day appointed by law for taking said alewives and fish ; whereby and by force of a law of this commonwealth, made &c., entitled &c., and by force of another act, made &c., the said C hath forfeited the sum of ten shillings for each offence, amounting in the whole to \$— ; and an action hath accrued, &c.

NOTE. These acts are unrevised. See APPENDIX to Mass. Laws, (1800,) p. 1020, 1022 ; 15 G. II.

Though the statute, on which the following Declaration is grounded is now repealed, it may not be amiss to insert it, as being short, and the only one in the book, grounded on the statutes of the commonwealth on the subject.

Qui tam for usury.

For that whereas on &c., at &c., it was corruptly and unlawfully agreed between the said T and one W, of &c., that the said T should bargain and loan to the said W, the sum of \$200, and should allow and give to the said W, day of payment therefor for the space of one year from that time, and that the said W, at the end of the same term of one year, should corruptly and unlawfully pay him, the said T, more interest therefor, than interest at the rate of \$6, for the forbearance or giving day of payment for \$100 for one year, viz. that the said W should, at the end of the said term of one year from the day aforesaid, give and corruptly pay the said T \$60 for the forbearance and giving day of payment, for the said sum of \$200, loaned as aforesaid, for one year next after the day abovementioned. And the plaintiff further avers, that there, on &c. the said W did corruptly and unlawfully pay the said T, and the said T did then and there unlawfully and corruptly receive of the said W, the sum of \$60 according to the corrupt agreement aforesaid, between them made for the said forbearance and giving day of payment, for the sum of \$200 aforesaid, loaned as aforesaid for the space and term of one year only, as aforesaid ; all which was against the statute in such case made and provided. By means whereof the said T hath forfeited and ought to pay the sum of \$200, being the value of the money loaned as aforesaid, one moiety thereof to the use of the commonwealth, and the other moiety to the use of the plaintiff, who sues for the same as aforesaid, and whereof the said T hath had due notice ; yet he hath never

paid the same though requested, but owes and unjustly detains it.

The two following forms are introduced for the purpose of showing the manner of declaring in Debt, on penal statutes, as practised in England.

Declaration qui tam, on the 9th Ann, against defendant for winning of one A. B., at a game called Fives.

Middlesex, to wit. R S, who sues as well for the poor of the parish of &c., in &c., as for himself, in this behalf complains of I M, being in the custody &c. of a plea, that he render to the poor of the said parish, and to the said R, who sues as aforesaid, eight hundred pounds of lawful money &c., which he owes to and unjustly detains from them.

For that one W P, from and after the first day of May, A. D. 1711, that is to say, on &c., to wit, at &c., did at one and the same time, by playing at a certain game called Fives, lose to the said I M a large sum of money, to wit, the sum of £100 of lawful money &c., and did then and there pay the same to the said I M; and the said R S, who sues as aforesaid, in fact saith, that the said W P, who lost the said sum of £100 as aforesaid, did not within the time in that behalf limited and prescribed, that is to say, within three months then next, sue or with effect prosecute, for the said sum of £100, so by him lost and paid as aforesaid; whereby and according to the form of the statute in such case made and provided, an action hath accrued to the said R S, who sues as aforesaid, to sue for and recover of and from the said I M, the said sum of £100, and treble the value thereof, making together the sum of £400, parcel of the said sum of £800 above demanded; and the said Richard, who sues as aforesaid, further saith, that the said I M, after the said 1st day of &c., that is to say, on &c., to wit, at &c., received to the use of the said W P the further sum of £100 of like lawful money, &c., then and there lost by the said W P to the said I M, at one and the same time, by playing at a certain other game called Fives, and then and there paid by the said W P to the said I M. And the said R S, who sues as aforesaid in fact further saith, that the said W P, who so lost the said last mentioned sum of £100 as aforesaid, did not within the time in that behalf limited and prescribed, that is to say, within three months then next, sue or with effect prosecute for the said last mentioned sum of £100, so by him lost and

paid as aforesaid, whereby and according to the form of the statute in such case made and provided, an action hath accrued to the said R S, who sues as aforesaid, to sue for and recover of and from the said I M, the said last mentioned sum of £100, and treble the value thereof, making together the sum of £400, residue of the said sum of £800 above demanded, yet the said I M, although often requested, hath not yet rendered the said sum of £800 above demanded, or any part thereof, either to the poor of the said parish, being the parish where the said several offences were committed, or to the said R S, who sues as aforesaid, but to render the same, or any part thereof, he, the said Richard, hath hitherto wholly refused, and still refuses so to do.

Declaration qui tam, for usury on the statute, 12 Ann, ch. 16, for the forbearing a sum of money paid, at three different times.

And whereas the said T G, after the 29th day of September, A. D. 1714, and before the day of exhibiting the bill of the said I P, who sues as aforesaid, to wit, on &c., at &c., by and upon a certain other corrupt contract and agreement, made by and between the said T G, and the said T E and I M, after the said 29th day of September, A. D. 1714, aforesaid, to wit, on &c., at &c., did take, accept, and receive from the said T E and I M the sum of £9, 18s. 7d. of lawful money &c., for the said T G's forbearing and giving to the said T E and I M day of payment to the said T G, of the sum of £560, 18s. before then to wit, on the said 16th day of June, A. D. 1784, aforesaid, at L aforesaid, lent by the said T G to the said T E, and I M, from the said time of the said lending thereof, in manner and form following, to wit, the sum of £300, part thereof, until the 12th day of September, A. D. 1780, the sum of £60, 18s., other part thereof, until the 17th day of September, in the year last aforesaid, and the sum of £200, residue thereof, until the 22d day of September, in the year last aforesaid, which said sum of £9, 18s. 7d., so taken, accepted, and received by the said T G, of and from the said T E and I M as last aforesaid, on occasion and for the forbearance last aforesaid, exceeds the rate of £5 for forbearing of £100 for one year, contrary to the form of the statute in such case made and provided; by reason whereof, and by force of the statute in such case made and

provided, the said T G hath forfeited for his said last mentioned offence, the sum of £1682, being the treble value of the said £560, 18s. so lent and foreborne as aforesaid, by reason of which said premises, and by force of the statute in such case made and provided, an action hath accrued, &c. &c.

DETINUE.

(See Com. Dig. Detinue; also Pleader, (2 X.)

THIS action, which is now nearly obsolete, lies to recover specific articles, detained without right. It may be brought by him who has only a special property, as a bailee: or by him who has the general property; and even although he has never been in possession; as, by the heir for an heir-loom. But where A bails goods to B, and afterwards gives them to C, C cannot maintain this action against B to recover them. Detinue does not lie against him, who has never been in possession of the goods; as, against an executor, upon a bailment to the testator, if the executor has never come to the possession of the goods. The reason of which is, that, as the judgment in Detinue is, that the plaintiff shall recover the specific articles of the defendant, it would be unreasonable, that such a judgment should be recovered of one, who has never been in possession of them. If the defendant has been once in possession of the goods, though he delivers them over to a third person before action brought, this action may be sustained against him. But it seems, if the defendant finds goods, and afterwards, before demand, loses them by accident, Detinue cannot be sustained against him. In order to maintain this action, in strictness, the property should be susceptible of a description so certain as to distinguish it from other property of a similar kind; and therefore, it will not lie for money *generally*, because one piece of money is like another. Nor for wheat out of a bag, or the like. But for property which can be identified, so as to be taken in satisfaction of the judgment, this action will lie. As, for money taken in a bag; or, taken in the view of another, though not in a bag; so, for money marked. It is said, that Detinue will not lie, where the defendant commits a trespass in taking the goods; because, by the tortious taking, the property of the plaintiff is devested. But *quære* of this, for the plaintiff may waive the Trespass; and, if a tortious taking is sufficient to prevent the plaintiff from recovering, because it devests the property; then, if the defendant is lawfully in possession, and afterwards, upon demand made, he refuses to deliver, and claims the goods as his own, the property of the plaintiff would, in like manner, be devested, and consequently he could not then maintain this action. But, in such case, the plaintiff can maintain no action, until after demand made, and then Detinue is a proper form of action; and, where the recovery of the specific article, and not damages, is the object of the suit, is almost the only action that affords this peculiar remedy. For the action of Replevin was originally intended to afford redress in cases of an unlawful taking only; and even now the law does not seem entirely

settled, that it can be maintained against one, who has come lawfully to the possession of goods.

But now, by ch. 119 of the Rev. Stat. of Massachusetts, section 27, Replevin may be maintained for goods *unlawfully detained*.

Of the Declaration.

The declaration must be grounded on the plaintiff's general or special property in the goods, and should allege, either that they were casually lost and came to the possession of the defendant by finding, or, in case of a special bailment, "that the plaintiff being so possessed of the goods as aforesaid, on &c., at &c., delivered the same to the defendant," &c., setting out the bailment specially. Willes, 118 ; 1 N. R. 146. If the defendant obtains possession of the goods *by wrong*, still it may be alleged that he came to the possession of them, *by finding*. 1 New. Rep. 140. The declaration should allege a request, because the manner of declaring admits, that the defendant came lawfully to the possession of the goods. *See Ibid.*

In describing the goods, more certainty is required than in Trover ; because in Trover, damages only are recoverable ; but in Detinue, as the judgment is, that the plaintiff shall recover the specific article, the declaration should describe it so certainly that it may be known, to be delivered to the plaintiff *in specie*. Co. Lit. 286, b ; Cro. Eliz. 457. Where a number of things are sued for, it is proper that they should be separately valued. 2 Rol. 96. There are, however, authorities to show, that this is not indispensably requisite and that they may all be valued in gross. 2 Bl. 253. But since, where the articles are valued all together in gross, if the plaintiff recovers only part of them, there will appear to be no distinct valuation of that part, for the information of the court or jury, there seems, in such case, the same reason for a separate valuation of the part recovered, that there would be, if that part alone had been sued for. It is true, if the plaintiff gets a judgment for the whole of them, the valuation in gross is sufficient ; because then the reason is the same, as if he had sued for and recovered one single article, valued in the declaration. But, if he gets judgment for one thing only out of a number, valued in gross, how can it be said that the article recovered, has a value set on it in the declaration ? If, therefore, a valuation is indispensably necessary, it seems more safe, that each article should be separately valued. In Detinue of charters or title-deeds, it is said to be necessary to set forth the plaintiff's title to the lands, to which they relate, as the deeds usually follow the title. Detinue is now superseded by Trover, which was introduced at first on account of the law wager, anciently allowed in Detinue. In other respects there does not appear to be any very essential difference between the two forms of action. In Detinue the gist of the action is the unlawful *detention* of the plaintiff's property from him. In Trover, the gist of the action is the tortious conversion of the plaintiff's property to the defendant's use. But an unlawful detention of the plaintiff's property, that is to say, a detention after demand and without lawful cause, which will sustain an action of Detinue, is also conclusive evidence of such a conversion, as will sustain Trover. In Trover, damages only are recoverable ; in Detinue the judgment is, that the defendant shall recover the specific article, or the value thereof. Detinue is in the nature of Debt and may be joined with it ; Trover is a species of action on the Case. Though Detinue is now rarely brought, yet cases occur where perhaps

it will afford the best redress ; and, as the wager of law in this commonwealth would hardly be allowed, as it is presumed, in Detinue, or in any other cases, except where expressly given by statute, there seems to be no objection whatever to the revival of this form of action, especially where the property detained has any peculiar value in the plaintiff's estimation, or, is not of a nature to have any proper or adequate appraisement in money.

In some particular cases Replevin may be preferable, because there the plaintiff obtains possession of the article demanded, until the right of property is tried. But if the defendant has *eloigned* it, so that it cannot be found ; or if it has come to his hands by bailment from the plaintiff ; it will be safer to bring Detinue.

DECLARATIONS IN DETINUE.

For detaining a promissory note, made by plaintiff and indorsed to the defendant, &c., after payment.

For that the said plaintiff, on &c., at &c., made his promissory note, in writing, with his name thereto subscribed, by which note, he, the said plaintiff, promised to pay one C or order, at a time therein mentioned, the sum of \$— for value received, and which said note, he, the said C, then and there indorsed over to the said Y ; and though the said plaintiff, on &c., at &c., fully paid to the said Y, the said sum of \$—, contained in the said note, according to the tenor and effect of the said note, and after payment thereof, then and there requested the said Y to deliver up the said note to him, the said plaintiff ; and although the said Y then and there had the said note in his custody ; yet he, the said Y, although often required, hath not delivered up the said note to the said plaintiff, but unjustly detains the same. 2 *Attorney's Vade Mecum*, 462.

For detaining an adjustment of an account.

For that the said Y, on &c., at &c., by writing under his hand, with his proper name thereto subscribed, acknowledged to be due from him, the said Y, to the said plaintiff, to balance their mutual accounts, the sum of &c., and thereof the said plaintiff, on &c., at &c., was possessed as of his own writing, and then and there delivered the same to the said Y, to be safely kept and to be redelivered to the said plaintiff on demand ; yet the said Y, though often requested, hath not delivered the said writing to the said plaintiff, but unjustly detains the same.

For detaining plans of an estate of which the plaintiff was tenant for life.

In a plea of Detinue, for that whereas the plaintiff heretofore, viz. on &c., at &c., was lawfully possessed of certain plans or delineations of certain houses and lands of the plaintiff, viz. a certain plan of a certain tract of land, &c., situate &c., (*here describe the plans sued for, with all convenient certainty*) as of his own plans or delineations, and being so possessed, the said plaintiff afterwards, viz. on &c., casually lost the said plans and delineations out of his possession, which thereafterwards, viz. on the same day, came into the hands and possession of the said Y by finding; and the plaintiff further saith, that although the said Y well knew that the said plans and delineations were the proper plans and delineations of the plaintiff, and although requested by the said plaintiff, viz. on &c., at &c., to deliver the same to the plaintiff, yet the said Y hath not delivered up the said plans and delineations to the plaintiff, but wholly refuses so to do, and still unlawfully detains the same.

NOTE. The form of the judgment is thus: *Therefore it is considered by the court, that the said plaintiff do recover the said plans and delineations in the said declaration mentioned, or the value thereof, together with his damages, costs and charges aforesaid, in form aforesaid, assessed by reason of the said Detinue, &c.* 7 Went. 645.

REPLEVIN.

Of Replevin at Common Law.

THIS action lies to recover goods, and chattels, unlawfully taken from the possession of the plaintiff, and in which he has a general or qualified property. 7 Johns. 140. It does not lie for things annexed to the freehold, until severed. 4 Bac. Abr. 385; 17 Johns. R. 116. It will not lie for choses in action, but only for goods and chattels, which may be delivered to the plaintiff, and, if the judgment is so, may be returned to the defendant. It lies for a ship.

What property or possession the plaintiff must have.

A sheriff, who has attached goods or taken them in execution, may have this action against any one, who unlawfully takes them out of his possession. 14 Johns. R. 34.

If a cow distrained, &c. has a calf, Replevin lies for the calf. F. N. B. 69, G.

If goods pledged are taken from the possession of the pledgee, he may maintain this action. Co. Lit. 145. But generally, a mere bailee cannot maintain this action. 10 Mod. 25.

A husband may have Replevin for the goods of the wife, taken before marriage, alone, or he may join his wife. 2 Esp. 48; F. N. B. 69, K.

So, an executor or administrator may have this action, for the goods of the testator taken in his lifetime. See 1 Sid. 81.

If cattle, unlawfully taken, return to the owner, he may maintain Replevin for the unlawful taking. F. N. B. 69.

Where the taking is lawful, if the detention is unlawful, in some cases, the owner may maintain Replevin; as where cattle taken *damage feasant*, are detained after tender of amends. So in all cases where, by the unlawful detention or other act, the party becomes a trespasser *ab initio*. Some late cases go the length that the action of Replevin may be maintained in every case, where the detention of the goods from the plaintiff is unlawful; whether the taking of the goods by the defendant were originally lawful or not. 15 Mass. R. 359; 16 Mass. R. 147; 1 Dal. 156. See 5 Mass. R. 280; 15 Johnson's Rep. 401.

And now, by chap. 113, of the Revised Statutes of Massachusetts, sect. 27, Replevin may be maintained for goods unlawfully detained.

But in order to sustain Replevin, the plaintiff must have a right to immediate possession of the goods, &c. 7 Term Rep. 9; 3 Pick. 255.

By and against whom Replevin lies.

This action may be maintained against one who commands the taking, as well as against the unlawful taker, and that, severally or jointly at the plaintiff's election. 2 Rol. 431, l. 5.

So also against one who takes cattle *damage feasant*, if detained after tender of amends.

Where A is in possession of a quantity of any thing, in bags, barrels, &c., of which a certain number belong to B, though not marked, distinguished, or separated in any manner, and the whole quantity is attached as the property of A, B may replevy the number of bags, &c. which belong to himself, and being all alike, may take any, indifferently, to make up his number. See 9 Mass. R. 427.

But if A and B are tenants in common of a chattel, and it is attached for A's debt, B cannot maintain Replevin for his moiety, whether the whole chattel is attached as belonging to A, or only A's moiety. If it appears from the plaintiff's own showing, that he is but part owner, the court will, *ex officio*, abate the writ. 2 Mass. R. 511. If A takes B's goods and delivers them to C, B may maintain Replevin against C. 5 Mass. R. 280. But unless C obtains the goods from A tortiously, or with notice, *quare*, if B must not make a demand previously.

But, under the statute of this commonwealth, Replevin lies for goods attached on mesne process or taken in execution, provided the debtor in the original suit, is not the plaintiff in Replevin. Therefore, if A's goods are taken in execution for B's debt, A may maintain Replevin against the officer.

Where Replevin does not lie.

At common law this action does not lie for goods in the custody of the law ; nor for money ; nor for materials made up ; nor for animals *feræ naturæ*. Bac. Abr. (4) 384.

If goods are taken beyond seas from the owner, and afterwards brought to this country, Replevin cannot be maintained. Show. 91. The action is local.

Decisions under Massachusetts statutes.

A writ of Replevin must be indorsed. 3 Mass. R. 199.

A Replevin bond is good, though dated after the service of the writ, and signed by some of the plaintiffs only. 14 Mass. R. 313.

If plaintiff lives in Middlesex, defendant in Essex, and the taking is in Suffolk, under the statute which requires "that all personal or transitory actions," must be brought in the county where one of the parties reside, where must Replevin be brought? Replevin is not transitory, though it is a personal action; the clause must therefore be restrained to transitory actions, and must be construed, as if it had been said, all transitory actions. For all transitory actions are personal. And the word transitory is put in, to show in what sense the word personal is used. For the ellipse should be supplied thus, "all personal, or" which is the same thing, (though it be not so) "transitory actions." Replevin must therefore be brought in Suffolk, where the taking happened. If brought in the wrong county, judgment will be arrested after verdict. *Robinson v. Mead*, 7 Mass. R. 353. But if goods are taken in Suffolk and carried into Essex, Replevin may be brought in either county. 1 Str. 507; 2 B. & P. 481.

Under the Revised Statutes of Massachusetts, chap. 113, sect. 28, the action is to be brought in the county where the goods are detained, &c.

Though the Replevin bond should be taken for more than double the value of the goods named in the writ of Replevin, it is no ground to quash the writ. 8 Mass. R. 153.

If the officer takes the goods from the defendant's possession, before the plaintiff executes the bond, but does not deliver them to the plaintiff until after it is executed, it is sufficient. 7 Mass. R. 97. But if after taking the goods from the defendant, the plaintiff never executes the bond, will not the writ be quashed, and will not the officer, and the plaintiff in the writ of Replevin, be liable to an action of trespass? *Quære*.

Previous to the statute, 1822, chap. 110, if the defendant died pending an action of Replevin, the cause of action did not survive; but by that statute, if either party dies, his executor or administrator may come in and prosecute or defend, as the deceased party might have done. And now, by the Revised Statutes, ch. 93, sec. 7, this action survives, &c.

Of the declaration in Replevin.

The forms of the writs and declarations in Replevin, are given by the

statute of the commonwealth. It should be observed that a writ of *Withernam* is provided, in case of a return, on an execution in favor of the plaintiff, that the goods are eloigned. By the common law, a writ of *Withernam* might be had against the defendant, in case of such return, on mesne process, but no such is provided in the statute of this Commonwealth.

The description of the property to be replevied should be certain and true. But the object of the description is, not to enable the officer to find it himself, and deliver it to the plaintiff, but it is in order that it may appear on the writ that the officer was warranted in delivering the property to the plaintiff. Thus, if the description is, "one black horse," this is sufficiently certain; though, if the defendant happens to have four or five black horses in possession, it will not be sufficient to enable the officer to select the particular horse, himself. But this is sufficient to warrant the sheriff in delivering a black horse to the plaintiff, and the particular horse should be pointed out by the plaintiff or some one in his behalf. See 2 Saund. 74; Str. 1015.

The action may be brought, and consequently the declaration may allege the taking, in any county in which the goods are found after the first taking. 2 Wils. 354; 2 B. & P. 480.

Where Replevin is brought by husband and wife, for the chattels of the wife taken before marriage, the taking must be alleged to *their* damage and not to *the husband's* damage alone. Strange, 1015; 1 Moore, 386.

Where some of the cattle are taken in A, and some in B, the declaration should designate those which were taken in each place. Lit. 37.

It is said, 1 Moore, 386, that in Replevin for taking goods, the value, as well as the number, must be stated with certainty; but this is the rule only where the action is in the detinet. The usual form is in the detinet, for the sheriff replevies the goods and delivers them to the plaintiff. 1 Saund. 347, b. 2.

As there is no new assignment in Replevin, as there is in Trespass, greater certainty is necessary in showing the place of taking in the declaration in Replevin, than in Trespass. But if the cattle are taken at A, and led through B, the taking may be alleged to have been at B, and if the defendant has a justification for taking them at A, he must plead it specially. Ibid. *in notis*, cites Dyer, 246; 1 Wils. 219; 3 Wils. 297.

Replevin in the detinet is where the goods remain in the hands of the taker, in which case the plaintiff recovers the value of the goods, as well as damages for the detention. Ibid. This, however, is obsolete.

It is seen, before, that part owners must join, and that one cannot sue alone for an undivided part; on the other hand, if A's cattle and B's cattle are taken together, they cannot join in a Replevin. Each must sue separately. Com. Dig. Plead. 3 K. 10.

TRESPASS.

AN action of Trespass lies for any injury done to a man's person or personal or real estate, accompanied with any species of direct force, whether actual or implied.

1. *Assault and Battery.*

Trespass to the person, or assault and battery, as it is usually termed, may be brought, not only for violence, offered immediately to the plaintiff by the defendant, but also for any act done by the defendant, by which another person or thing causes a battery; as where one pushes another against the plaintiff, or strikes a horse so that he kicks the plaintiff, (L. Raym. 955;) or throws a squib into a market place, which is thrown about by different persons to keep the danger from themselves, until it strikes the plaintiff, he may maintain this action against the first agent or thrower. 3 Wils. 403; Salk. 637.

If A license B to beat him, the license is void, and A may still maintain an action for a battery against B. Comb. 218.

Where there is a mere trial of skill at any lawful pastime, and one of the parties is hurt, this action cannot be maintained. As if two persons should play at cudgels, &c. It was held, however, that, where two *boxed* by consent, and one was hurt, it was no bar to the action, (Bul. N. P. 16,) because the act of boxing is unlawful. This, however, is to be understood of prize-fighting or pugilism, as practised in England, which is fighting by consent, and doing each other all the injury practicable, provided the parties do not transgress the laws of that brutal pastime, which of course is unlawful as a breach of the peace.

An offer or attempt to strike or seize a person; lying in wait for him; or besetting his house, &c.; putting the hand on his sword to draw it; without actually touching his person in either case, is sufficient to constitute an assault. 1 Went. 256; 1 Salk. 79. To assaults, as thus defined, intention is essential. For if, when a man places his hand on his sword, he uses any expressions, which show he has no intention to use his sword, it will not amount to an assault. 2 Mod. 3, *Redman v. Edolfe*.

A man cannot sue for an assault alone, but should declare for an assault and battery; and, if there was an assault, he may recover for that although there was no battery. 2 Lev. 102; 1 Vent. 256.

A battery is the commission of violence to another person, by beating, pushing, or touching his person, in any angry or spiteful manner whatever. But jogging a person in earnest discourse, is no battery. A mayhem is an aggravated battery, and consists in depriving a person permanently of the use of any member necessary for his defence, as a hand, arm, eye, &c.

Imprisonment is any detention of a person without his consent, wherever committed, and of however short continuance; thus to take a person by the collar, and hold him in the street, if without lawful cause and without his consent, is a false imprisonment. The law is the same with regard to all unlawful arrests. Whether words alone will constitute a false imprisonment, is not quite settled. But suppose E points a musket at F, and tells him he will shoot him if he stirs, is not that an

imprisonment? Or suppose an officer tells a man that he is his prisoner, and the man submits and goes with him without more?

Where an Arrest may be justified.

An arrest is justified, if made pursuant to a lawful warrant directed to the party making it. It may be justified *by an officer*, without a warrant, if a felony has been committed, and there is probable cause to suspect the person arrested, though he may be innocent.

So an officer may justify an arrest *without warrant*, during an affray, and to prevent a breach of the peace; but not after the affray is over.

And it seems, that any private person may so far interfere, as to restrain any one from a breach of the peace; and, where a felony has been committed, may, *without warrant*, arrest the perpetrator; but this he will do at his peril, for, should it turn out that the party arrested is innocent, he may have this action for the assault, battery, and false imprisonment. *Quære, if probable cause* to suspect a person, where there has been a felony committed, will not be sufficient to justify the detention of such person, by a private individual, until the fact can be ascertained? Public policy seems to require it, since otherwise, for want of an officer, the greatest criminals may escape with impunity.

What will justify an Assault and Battery, &c.

Generally, in the resistance of unlawful violence, a person is justified in using any degree of force, which self-defence may render necessary; or, which the protection of a husband, wife, parent, or child may require. 3 Salk. 46; Lord Raym. 62. A servant also may justify any force which may be necessary for the defence of his master; but it should be pleaded, that plaintiff would have beat his master. Stra. 3.

An assault alone without a battery, as a blow aimed or offered, is sufficient to excuse a battery on the defendant's part, if he cannot otherwise avoid it, since, if he waited till the blow had taken effect, it might be too late to prevent the injury, as he might be disabled by the blow. But, as such a battery can only be justified on the ground of self-defence, &c., as before stated, an assault will not justify a battery altogether disproportioned to it. See 2 Salk. 642. An officer may justify a battery of any prisoner who resists. A master may moderately correct his scholars or apprentices; a parent, his child. So also a master of a ship may moderately correct his seamen for misconduct on board his ship, for the necessary preservation of discipline. 14 Johns. R. But if immoderately or unreasonably, he will be liable. Ib. So a man may justify a battery upon any one, who unlawfully takes away his goods, while in the act, or who would unlawfully force into his house. 8 T. R. 78.

No action for a battery can be sustained against any officer for turning out of church one who disturbs the congregation, or a funeral procession. Nor against a private individual. Modern R. 168; 1 Lev. 196.

No action for assault and battery, or false imprisonment, can be maintained against one who restrains another from doing mischief.

Where a person comes quietly into a house, the owner must first request him to depart, before he can justify laying hands upon him to turn him out; and even then must use no more violence, than is necessary for that purpose. 8 T. R. 299.

A man may justify an assault and even a battery, in defence of his beasts. *Quere.* See Lutw. 1483.

A justice of the peace may personally arrest any one, who breaks the peace in his presence; or, by words without warrant, may authorize any by-stander to do so. But a warrant is necessary, if the breach of the peace is in his absence.

An officer committing a person, must, at his peril, see that his warrant is legal. Cro. Jac. 81.

Any private person may justify breaking into a house to prevent murder, rape, robbery, an affray, &c.. and may restrain the offenders.

Any private person, present when a felony is committed, is bound to arrest the felon; and, where absolutely necessary to arrest the offender, may justify breaking the doors of his house, or the house of a stranger for that purpose. But, in all such cases, there should be a previous demand of admission, and a statement of the cause of it.

It is laid down that an officer, informed of a *felony actually committed*, may, without warrant, arrest the person suspected, and break doors for that purpose, though the party be innocent, if there be probable cause.

And if there is only probable cause to suspect, that a felony has been committed, and the officer is informed of it, and arrests an innocent person, upon probable cause of suspicion against him, it is now clear that the officer is justified. See Doug. 358. This appears reasonable, because if he should wait for a warrant, the person suspected might escape; and whether any act is absolutely felonious or not, may sometimes depend on circumstances of which the officer is not the judge, and it is against good policy, where there is reason to believe that a felony has been committed, to compel the officer at his peril first to make the fact certain, before he arrests the person whom there is probable cause to suspect. But a private person, not being under the same obligation in such case, has not the same indemnity extended to him. But he must at his peril ascertain that a felony has been committed, before he arrests any one upon probable cause of suspicion against him. See 1 East's P. C. 300, 301. (*See Phillips v. Trull*, 11 Johns. R. 444.)

It is laid down, that where E has a warrant against F, and G affirms himself to be F, and E arrests him, that G may have this action against E. See Hard. 323; Moor. 457. But it seems unreasonable that G should have an action against E in such case, unless E keeps him imprisoned after notice of the fact. For E is not in fault, and whatever G suffers is from his own falsehood; and *volenti non fit injuria*.

It is said a jailer may give reasonable correction to his prisoner. 1 Hawk. P. C. 130. This doctrine appears to be laid down too broadly. A jailer, being responsible for the safe custody of a prisoner, without doubt may make use of any restraint necessary for that purpose. So also, having the management and superintendence of the prison, he may compel submission by the prisoners to his will, in cases where the law intrusts him with a discretionary authority. For instance, if a prisoner is in the room E, and the jailer chooses that he should occupy the room F, the jailer has no authority to beat him until he goes voluntarily into the room F, as he would have, if he had the authority of administering reasonable correction. On the contrary, the jailer in case of resistance, has only an authority to call for assistance and remove him by force.

An action for false imprisonment may be maintained for an arrest on Sunday on civil process. Salk. 78.

Where a party is arrested under void, or irregular process, or under process from a court not having jurisdiction, this action may be maintained against the person named as plaintiff in such process. 3 Wilson, 341; 1 Strange, 509; Cro. Jac. 514; 2 Bl. R. 1141.

Where the arrest and imprisonment are justifiable, if there are any circumstances of cruelty or oppression practised, this action may be maintained for a false imprisonment. 1 T. R. 536.

Where, after an arrest, the plaintiff in the action orders the sheriff to discharge the defendant, and the sheriff detains him, such defendant may maintain this action against the sheriff. So in case of a supersedeas.

Where the false imprisonment is procured to be done by a third person, this action may be maintained against the person procuring. 2 Bl. R. 1055.

It may be maintained in this country for false imprisonment in a foreign country. Cowp. 161. *Quare* in every case.

2. For injuries to a man's goods and personal estate.

An action of Trespass may also be maintained against any one, who takes and carries away, injures, spoils or destroys any of the goods, or cattle, or chattels, or charters of another. So also for taking a sum of money numbered; for taking away a ship; an ox; a bond or other writing; for driving sheep with a dog; for beating a horse; for spoiling clothes, &c.

And a bare possession of any of the foregoing, is sufficient to maintain this action against a mere wrongdoer; thus a mere bailee, or a sheriff who has taken possession of the goods under mesne or final process, may maintain this action. 13 Johnson's Rep. 141, 561. An executor may have Trespass for the goods of the testator taken out of the executor's possession; but for those taken out of the testator's possession, he should bring Trover or Detinue, and waive the trespass; since Trespass does not survive.

But now, under the Revised Statutes of Massachusetts, the actions of Trespass for assault and battery, &c., or for goods taken and carried away, and Trespass or Case, for damages done to real or personal estate, survive for and against an executor or administrator. Chapter 93, section 7.

So also a consignee or purchaser of goods may maintain Trespass, though he has never been in actual possession of them.

So after the death of a wife or servant, the husband or master may maintain trespass for taking either with the plaintiff's goods.

But the plaintiff must either have an actual, or constructive possession of goods, in order to maintain Trespass; and where he has a right to reduce them into his actual possession when he pleases, it is sufficient. 8 Johns. 432; 11 Johns. 285.

Where Trespass for goods does not lie.

An action of Trespass cannot be maintained for goods, which the party comes lawfully by; as by the delivery of the plaintiff; of a sheriff; by finding; upon a sale, though the seller was not the owner, if the buyer did not know it.

But it is said, if A finds the goods of B, and embezzles them, B may maintain Trespass for them; but it would be safer to bring Trover or Detinue.

This action, as well as Trespass for an assault and battery and false imprisonment, is transitory.

Where goods are altered *in form*, after being taken from the plaintiff's possession, he may justify retaking them; as if timber is cut up into boards, or cloth is cut up into pieces.

But if they are *materially* altered, or wrought up with other materials, it seems they cannot be retaken; but the plaintiff must resort to his proper form of action, as Trover, Trespass, &c., according to circumstances. See Mod. 19, 20. *Quare*. It is there laid down that if cloth is made up into clothes, the clothes may be taken, but this must be understood with some reservation. See the *Civil Law on this subject*.

A man never becomes a trespasser by a bare non-feasance. *Ld. Raym.* 188; 8 Co. 146, b.

In what cases, CASE is the proper form of action, and not TRESPASS, see ante, CASE.

3. *Trespass to lands and tenements, or quare clausum fregit.*

For an injury to the lands or tenements of another, an action of Trespass *quare clausum fregit*, may be maintained.

This action may be maintained for entering one's house or close without license; for treading down, eating, or spoiling hay, grass, &c., with cattle, &c.; for breaking down fences; cutting down trees, &c.; for hunting in one's land, &c.

What is a sufficient possession.

Actual possession is necessary to maintain this action, but a bare possession is sufficient against a mere wrongdoer. 4 Taunt. 547. And therefore tenant at will, or by sufferance, can maintain this action against a stranger. 2 Roll. 551. The lessor in such case may also maintain Trespass for an injury to the land. So a mere lessee or grantee of herbage, underwood, &c., although the soil does not pass, may recover in this action for any injury to their interests. But a commoner cannot have this action; he must bring a special action on the case.

So a disseizor may maintain Trespass against every one but the disseizee or his attorney.

A disseizee may maintain this action against the disseizor for his first entry, without re-entry; or, against any claiming under him, for the Trespass during that time, but the disseizee must first re-enter, and then he may recover, for the whole time he has been out of possession, against the disseizor, or those who have been in possession under him, by laying the trespass with a *continuando*. Mod. 461; Co. Lit. 257, a.

If an heir enters upon an abator, he cannot maintain Trespass for the wrong done before. 5 Com. Dig. 537.

Though a bargainee in England cannot maintain Trespass before entry; yet, under our common deed with warranty, acknowledged and recorded, it seems Trespass may be maintained without actual entry.

A lessor cannot maintain Trespass, *quare clausum fregit*, against a stranger, during the continuance of the lease. But the tenant in possession may bring Trespass, and for an injury to the reversion, the lessor must bring Case. 1 Johnson's Reports, 511; 3 Johnson's Reports, 461.

But after a disseizin, if the disseizee's estate determines before entry, he may maintain Trespass against the disseizor without entry; because the disseizee has no right to enter. 2 Rol. 550.

Where a man sells his land, he may maintain Trespass for a wrong, done before the sale. 2 Rol. 569, b. 20.

Where the owner of land lets it on shares to another, they may join in Trespass against a third person, who commits a Trespass affecting their joint interest. 3 Johns. R. 216. But the lease must be for more than a single crop. 8 Johns. R. 151.

Where there is a lease at will, if the tenant at will commits voluntary waste, it is a determination of the tenancy, and the lessor may recover in Trespass against such tenant. 7 Johns. R. 1. Ld. Coke assigns as a reason, because voluntary waste is an act contrary to the trust reposed by lessor in tenant at will. Co. Lit. 57, a.

Against whom Trespass quare clausum fregit may be maintained.

Trespass is joint and several in its nature, and every one aiding or abetting, or commanding a Trespass, is liable for the whole damage, and may be sued for it alone, or jointly with the others, at the plaintiff's election; and, if the plaintiff recovers for the whole damage, of one, although the others may plead that recovery in bar of another action for the same trespass against them; yet such defendant, so paying, can have no action for a contribution.

Where cattle belonging to E, in the custody of F, escape into G's land, and do a trespass there, G may maintain Trespass against E or F at his election. 2 Rol. 546, l. 20.

Where a man has an authority given him *by law*, and he abuses it by *misfeasance*, he becomes a trespasser *ab initio*. But a man does not become a trespasser *ab initio*, by a bare *non-feasance*. 8 Co. 146, b; 13 Johns. 414; 15 Johns. R. 401.

And where a man has a license given him *by the party*, and abuses it, he does not become a trespasser *ab initio*. 13 Johns. R. 414; 8 Co. 46, b.

Neither can a man become a trespasser *ab initio*, unless he was implicated at first. Anthon's N. P. 159, a.

Where E and F contract for the sale of land belonging to F, and E enters upon it and cuts timber, and afterwards the contract is rescinded by E, F may maintain Trespass against E. 9 Johnson's Reports, 35.

Where E hires land of G on shares, and afterwards assigns his interest in the crop growing, to F, if a stranger cuts and carries away the crop, F must sue in his own name, and cannot maintain Trespass in the name of E. 9 Johns. R. 143.

To enter a dwellinghouse without license is generally a trespass; but where there is a familiar intimacy, it may be shown as evidence of a license. To enter an inn without express permission, is no trespass; for, keeping an inn amounts to a general license. If a man enters a

dwellingshouse by permission, and continues there after a request to leave it, he becomes a trespasser. 12 Johns. R. 348.

In the case cited, it is said, he becomes a trespasser *ab initio*; but *quare* of this, since the license to enter is not given by law, but is the act of the party.

If a person having a right to enter, enters with force, he is not liable to an action of Trespass, though he may be indicted for it. 13 Johns. R. 235.

Where Trespass quare clausum fregit cannot be maintained.

An heir cannot maintain Trespass against an abator, because he has never been in possession.

An owner of a pew cannot maintain Trespass for entering it, because he has not exclusive possession; the possession of the church being in the parson. 1 T. R. 430.

If a man imprisons me wrongfully, I may justify the breaking of windows or doors to get out. Com. Dig. Trespass, D.

If E sells F all his trees, F may enter E's land to cut them down, &c. when he pleases. 2 Rol. 567.

If E's house is on fire, and I, to save my own, pull his down, he can maintain no action against me. *Ibid.*

If cattle are damage feasant on my land, I may drive them out, but must not injure them. 4 Co. 38, b.

An executor may enter to take timber belonging to the deceased; so a reversioner may enter to view waste, if he does not break a door or window. 2 Rol. 568.

If cattle going along in the highway, eat *raptim et sparsim* against the will of the owner, it will excuse the Trespass. 2 Rol. 556.

Other cases where Trespass may be maintained.

Trespass lies for the husband for the battery of his wife, whereby he lost her society, &c. Com. Dig. Trespass, B. 5.

So it lies for the battery of a servant, whereby plaintiff lost her service.

Trespass also is frequently brought by a husband for the seduction of his wife or daughter, and then usually the declaration is in Trespass *quare clausum fregit*, and the special matter is alleged by way of aggravation.

Trespass lies for procuring, by fear and influence, an independent foreign prince to imprison the plaintiff. 2 Bl. 1055.

If a justice of the peace maliciously grants a warrant against another, without any information, upon a supposed charge of felony, Trespass lies against him. Comyn's Digest, Trespass, B. 5, cites 2 T. R. 225.

Trespass lies against an attorney who sues out irregular process and delivers it to an officer. Bl. 860.

Trespass, it is now settled in this commonwealth, is the proper remedy against assessors for an illegal assessment. *See ante, Case.*

But assessors of a town, acting with fidelity and integrity in assessing a tax, &c. are not responsible in any form of action, for accidentally

assessing a person not an inhabitant of the town, and so not liable to be taxed. *Baker v. Allen*, 21 Pick. 382.

If the plaintiff's property in such case, should be taken and sold, under a warrant, he has no remedy, under the Rev. Stat. ch. 7, sec. 44, against the assessors. He may, however, recover the money back from the town. *See ib.* A very unsatisfactory remedy, and which sometimes must be wholly inadequate. E has a new chaise worth \$200. He is assessed in a wrong place. The deputy-sheriff, under a warrant, takes his chaise, and E not being able to raise the money, it is sold at auction for \$50; E has no remedy except to recover back the \$50 from the town, supposing the tax to have amounted to so much.

Where a Trespass is done to several at the same time, each should bring the action severally. 3 Lev. 354. Unless where they have a joint interest in property, the subject of the Trespass.

Where a Trespass is done by several, the action may be brought against all, or any of them. 1 Lev. 41.

If E's wife puts E's cattle into F's land, F may maintain Trespass against E. 2 Rol. 553, b.

But if E's servant puts his cattle into F's land, without his master's knowledge, F may maintain Trespass against the servant, but not against the master.

If cattle in E's custody do a trespass, Trespass may be brought against E, or against the owner, at the plaintiff's election. Rol. 546. But trespass cannot be maintained against a man for an act to which he is neither aiding nor consenting; as if E strikes a horse on which F is riding, and the horse kicks G, G may maintain Trespass against E, but not against F. Salk. 637.

After a recovery of land in ejectment, Trespass is also a proper remedy for the plaintiff to resort to, for the purpose of recovering the mesne profits. But where the recovery is had, not by ejectment, but by a writ of entry, or other real action, it is not equally clear, to what extent the demandant or plaintiff may obtain redress.

But now, under the Revised Statutes of Massachusetts, the demandant in a writ of Entry, is entitled to recover damages, in lieu of rents and profits, &c. &c. Ch. 101, sec. 14.

Of damages in Trespass.

It seems, the plaintiff may recover for all the direct damages resulting from the act of the defendant, even if a considerable time should elapse before those consequences follow, and is by no means obliged to rely on an action on the case, for that purpose. But, these damages, if peculiar or special, should be set forth in the declaration as matters of aggravation, that the defendant may have due notice of the claim.

Remote and contingent damages, or such as the plaintiff himself, having notice of the defendant's act, might have prevented, and which consequently result from his own wilful neglect, are not to be allowed. *See Loker v. Damon*, 17 Pick. 284.

In trespass against an officer for attaching a vessel, bound on a voyage, the jury ought not to assess damages for breaking up the voyage. *See Boyd v. Brown*, 17 Pick. 453; *White v. Damon*, 8 Pick. 356. *Quare*, whether this ought not to depend on the circumstances of each case.

DECLARATIONS IN TRESPASS.

1. *Assault and Battery.**Assault and Battery; common form.*

In a plea of trespass; for that the said D, on &c., at &c., with force and arms, in and upon the plaintiff, made an assault, and him then and there beat, bruised, wounded, and evil entreated; *and other enormities to the plaintiff the said D then and there did*, against our peace and to the damage, &c.

NOTE. Under the words in italics, the plaintiff is at liberty to give in evidence, nothing, except what could not decently be set forth on the record. Trespass for an assault and battery, is transitory; if committed abroad, say, for that the said D, on &c., at B, in parts beyond seas, or on the high seas, viz. at C, (*within the proper county*) &c.

Assault, battery, and false imprisonment, and holding in servitude.

For that the said D, at &c., on &c., with force and arms, assaulted the plaintiff, and him then and there took and imprisoned, and restrained him of his liberty, and held him in servitude, from &c., until &c., against the law of the land, and against the will of the plaintiff; *and other injuries the said D there within that time, did to the plaintiff against our peace, &c.*

JONA. SEWALL.

For assaulting plaintiff, and taking away his gun.

For that the said D and E, on &c., at &c., with force and arms, made an assault upon the plaintiff, and then and there beat, bruised, wounded, and ill treated him; and then and there took and carried away from the plaintiff, a gun of the plaintiff of the value of \$—, and converted the same to the use of the said D and E, &c.

For assaulting, beating, and wounding plaintiff, and tying him to a person, so that he caught the itch.

For that the said D, on &c., at &c., with force and arms, made an assault upon the plaintiff, and then and there beat, kicked, bruised, wounded, maimed, and ill treated him; and then and there struck and kicked him on the face &c., (*according to the fact*) and other parts of his body, many violent blows, &c., and thereby cut and bruised the face, &c. of the plaintiff, and then and there imprisoned him for a long space of time, viz. for the space of six months, against his will and without any legal cause whatsoever; and then and

there tied and fastened him to a certain person there, who then and there was infected with the itch, and was filthy and nasty, and kept him so tied and fastened for a long space of time, to wit, twenty weeks, whereby the plaintiff caught the same of him; by means whereof the plaintiff became sick and distempered, and so continued for a long space of time, to wit, two months, and was all the time aforesaid prevented from transacting his lawful and necessary business, &c.

For an assault and imprisonment, charging plaintiff with the watch, and causing him to be taken before a magistrate, &c.

For that the said D, on &c., at &c., with force and arms, assaulted the plaintiff, and then and there beat, bruised, wounded, and ill treated him, so that his life was despaired of, and then and there, without any legal or probable cause, against the law of the land and against the will of the plaintiff, imprisoned him and kept him in prison; and then and there without any justifiable cause, charged the watch with the plaintiff, and procured him to be forcibly conveyed in the custody of the said watchman, to a watch-house, then and there to be confined for a long time, and until he was afterwards with the like force, taken and carried before one A B, Esq., then and there one of the justices commissioned to keep the peace within and for the county of — &c., until the said plaintiff, for his deliverance from the said imprisonment, was forced to find, and did then and there find bail for his appearance before the said A B, or some other of the justices of the peace &c.; by means whereof the plaintiff was, during all that time, prevented from following his lawful and necessary affairs and business, which he would and might have done, and was put to great trouble and inconvenience thereby, and was obliged to expend and did expend a large sum of money in procuring the said bail, and in effecting his discharge from the said imprisonment.

For assaulting and beating plaintiff, &c., whereby he lost the sight of his left eye.

For that the said D, on &c., at &c., with force and arms, assaulted the plaintiff, and then and there beat, bruised, wounded, and ill treated him; and then and there, with a certain spy-glass, which the said D then and there held in his hands, struck the plaintiff divers grievous blows upon, across, and over his head, face, and eyes, &c., and other parts of his body, and thereby greatly cut and wounded the

head, face, and eyes of the plaintiff, and made divers large and deep cuts, gashes, and wounds therein; by means whereof the plaintiff hath not only suffered great pain, both of body and mind, but he hath from thence hitherto been in a great measure deprived of the sight of his left eye, and is very likely to be wholly deprived of the sight thereof, &c.

Assault, battery, and false imprisonment, under color of legal process.

For that the said D, E, and F, on &c., with force and arms, at S, aforesaid, assaulted the plaintiff, took him and carried him away several miles from his dwellinghouse in S aforesaid, and caused him to be tried and condemned as a criminal, without being charged with any crime, and caused him to pay a fine of five shillings, and twelve shillings under color of costs. And they, the said D, E, and F, then and there under unlawful imprisonment, judged, and condemned and held the plaintiff in prison, for the space of twenty-four hours, until, to gain his liberty, they compelled him to become bound with two sureties, to appear before the justices of the next Court of General Sessions of the Peace, which was then so to be held, at &c., in and for the said county of Essex, on &c., and abide the order of said justices on certain matters, whereof the said justices had not power or authority to take any cognizance, or give any sentence or judgment thereon; whereby the plaintiff was compelled to travel many days and miles, and expend large sums of money, to discharge himself from his bonds aforesaid; and other injuries the said D, E, and F, then and there did to the plaintiff, against our peace, &c.

W. PYNCHON.

NOTE. This action was brought against the defendant for illegal proceeding against the plaintiff, and granting and executing a warrant against him, and binding him over pursuant to a complaint for *words*, not cognizable by a justice criminally, as appeared by the complaint itself, which was in the former statute of lying and libelling. The justice and constable were condemned, as proceeding illegally, and the complainant acquitted; he having a right so to proceed till impeded by the justice.

Assault and battery, with aggravation and special damage.

For that the said E, on &c., at a place called Halifax, to wit, at H aforesaid, with force and arms, assaulted the plaintiff, then in our peace being, and then and there, with force and arms as aforesaid, seized the plaintiff by the throat, and almost choked him, and struck him several violent blows on his, the plaintiff's, head and face, and thereby grievously wounded him, and loosened three of his teeth; and the

said E, then and there continuing his outrage against the plaintiff, threw the plaintiff backward down on a cable and small billet of wood, and then and there the said E lifted the plaintiff up, and threw him down again backward on the cable and wood aforesaid with greater violence than before; and this the said E repeated divers times, and divers times kicked the plaintiff in his side, and stamped on his body, the plaintiff being all the while thereby unable to help or defend himself from the violent blows and falls aforesaid, from the said E; whereby the plaintiff was so wounded in his loins and the small of his back, that for six months after said assault, he was confined to his bed and chamber, and suffered extreme pain, and was put to great charge and expense for physicians, watching, nursing, diet and attendance, and the plaintiff to this day hath suffered much pain and weakness in the small of his back, occasioned by the injuries offered him by the said E as aforesaid, and is not likely to be a well man again; all which is contrary to our peace, &c.

KENT.

Assault, battery, and false imprisonment, and tarring and feathering.

For that the said T, on &c, at &c., with force and arms, an assault on the body of the plaintiff made, and him did then and there violently beat, wound, bruise, and evilly entreat, so that his life was thereby put in great danger; and the said T did then and there take and imprison the plaintiff, and him imprison for a long time, to wit, for the space of six hours, detain against the law and custom of this [commonwealth.] And he, the said T, did then and there grievously abuse the plaintiff, and forcibly took him and placed him in a cart, and stripped him naked to his skin; and with force as aforesaid, did tear off from his body the plaintiff's clothes, &c. &c., with sundry papers of the value of \$—, to wit, &c., also one piece of gold money, called a guinea, &c., all of the value of \$—; none of which things so taken have ever been returned to him again. And he, the said T, did then and there also cover and besmear the plaintiff's head, face, and naked body, with tar, and cover him over with feathers, and cruelly and inhumanly set fire to said feathers, and then and there dragged the plaintiff through divers streets of said H, and from one end of the said town to the other, for the space of six hours, as aforesaid, and fixed a label on the plaintiff's breast, with writing thereon, importing that the plaintiff was a common informer

and in that condition exposed the plaintiff to the contempt and resentment of the good people [of this commonwealth] and as a public spectacle through the said town; and other outrages and enormities then and there committed, against our peace and to the damage, &c. J. ADAMS.

Assault and battery, aggravation, breaking plaintiff's ribs.

For that the said D and E, on &c., at &c., with force and arms, on the body of the plaintiff, an assault made, and him then and there beat, wounded, and evilly entreated, and then and there, with force as aforesaid, violently threw the plaintiff upon the ground, and him, the plaintiff, on the ground then and there lying, the said D and E did cruelly beat and wound, as well by striking him with their fists, as with their feet, and then and there gave the plaintiff one violent blow in and upon his left side, and thereby broke one of his ribs, and endangered his life, and other outrages, injuries, and enormities on the plaintiff, they, the said D and E, then and there committed against our peace, &c.

F. DANA.

For striking plaintiff with a whip, and spoiling his clothes, &c.

For that the said T, on &c., at &c., with force and arms, made an assault on the plaintiff, and him then and there beat, bruised, &c. &c., and then and there, with a certain whip, which the said T then and there held, struck the plaintiff many grievous blows upon the head &c., and then and there greatly cut and lacerated the plaintiff; whereby he lost great quantities of blood, which then and there issued from his wounds, upon his clothes, viz. one coat &c., whereby they were greatly damaged; and the said plaintiff became sick and disordered, and so continued for a long space of time, viz. one month then next following, and by reason thereof, during all that time, was prevented from transacting his lawful business, and was obliged to expend a large sum of money, viz. \$—, in curing himself of his aforesaid wounds, &c.

For assault, battery and false imprisonment; tying him, &c.

For that the said D and E, on &c., at &c., with force and arms, assaulted the plaintiff and him then and there beat, bruised, wounded, and ill treated; and then and there tied and lashed together the plaintiff's hands and feet, and kept the same so tied and lashed for a long space of time, viz. — hours, and thereby, during all that time, deprived the plaintiff

of the exercise of his personal liberty, and then and there also forcibly and against his will, dragged, pulled and carried the plaintiff about from place to place, and with a certain large stick, then and there struck the plaintiff many violent blows upon his head, back, &c., and thereby greatly bruised, cut, and wounded him; by reason whereof, the plaintiff then and there, and for a long time afterwards, suffered great pain, and became sick and disordered, and incapable of transacting his lawful business, and so continued for a long space of time, *viz.* the space of one month, &c.

For knocking plaintiff down, striking him with a poker, pulling his hair, kicking him, &c.

And for that the said E and F, on &c., at &c., with force and arms, made an assault on the plaintiff, and him then and there beat &c., and then and there struck and knocked the plaintiff down, and whilst he was so down, and before and afterwards, with a certain iron poker, and otherwise, struck the plaintiff divers violent blows; and also then and there kicked and ill treated the plaintiff, and dragged, hauled and shook him about by the hair of his head, whereby he suffered great pain, and became sick and disordered, so that his life was greatly despaired of, &c.

For an assault and battery on board a ship.

For that the said L, on &c., with force and arms, made an assault on the plaintiff, then being on board the brig H, on the high seas, *viz.* at E aforesaid, and then and there beat, bruised, wounded, and ill treated him, and then and there struck the plaintiff divers grievous blows with a handspike, on the head, back and shoulders of the plaintiff, and knocked him down upon the deck of the said brig; and then and there, against the will of the plaintiff, put the plaintiff into irons, both hands and feet, without any reason or lawful cause whatsoever, and kept the plaintiff so ironed as aforesaid, and on a short allowance of bread and water, for a long space of time, *viz.* the space of three days, whereby the plaintiff became sick, weak, and emaciated, and his life was greatly despaired of; and other enormities to the plaintiff, the said L then and there did, &c., &c.

By husband and wife, for the battery of the wife, against husband and wife.

For that the said L (*the wife*) on &c. at &c., with force and arms, made an assault upon the said M (*the wife*) and then and there beat, bruised, wounded, and ill treated the

said M, &c., &c., and other wrongs to the said M, the said L then and there did, against the peace of the commonwealth, and to the damage of the plaintiffs.

NOTE. Nothing must be alleged in this count which affects the husband alone; as the expense of the wife's cure.

By husband alone, for the battery of his wife, per quod, &c.

For that the said D, on &c., at &c., with force and arms, made an assault upon the said E (*the wife*,) and did then and there beat, bruise, wound, and ill treat the said E, so being the wife of the plaintiff as aforesaid, insomuch that the said E, then and there became and was sick, lame and disordered, and so continued for a long space of time, to wit, hitherto; whereby the plaintiff, during all that time, lost the comfort, assistance, society, and benefit of the said E, his wife, in his domestic affairs, which he might and otherwise would have had; and thereby also the plaintiff was obliged to expend, and did expend a large sum of money, to wit, \$—, in the healing of his said wife of her said lameness, malady, and disorder, occasioned as aforesaid, &c., to the damage of the said plaintiff, &c.

NOTE. "To their damage" would be bad. It is said that care should be taken in declaring by the *husband alone*, for an assault and battery committed on the wife, not to include any injury for which the husband and wife together may maintain an action, lest judgment should be arrested; and therefore the personal sufferings of the wife must not be included. See Com. Dig. Plead. 2 A, 1; 1 Salk. 119.

For beating a daughter, per quod, &c.

For that the said D, on &c., at &c., with force and arms, made an assault on E F, then and still being the daughter and servant of the plaintiff, to wit., at &c., and then and there beat, bruised, wounded, and ill treated her; insomuch that the said E F, by means thereof, then and there became and was sick, lame, and disordered, and so continued for a long space of time, viz. from thence hitherto; during all which time, the plaintiff was deprived of the service of his said daughter and servant, and of all the benefit and advantage, that might and otherwise would have arisen to him from such &c., viz. at &c. aforesaid.

For debauching a daughter or servant; in Trespass. See ante, Case, p. 457.

For that the said T, on &c., at &c., with force and arms, assaulted, debauched and carnally knew one E F, then and

from thence hitherto the daughter and servant of the plaintiff; whereby the said E F became pregnant and sick with child, and so continued for a long space of time, to wit, nine months then next following, at the expiration whereof the said E F, on &c., at &c., was delivered of the child with which she was so pregnant as aforesaid, viz. at &c. aforesaid; by means of which said several premises, the said E F, during all the said nine months, was unable to perform the necessary affairs of the plaintiff, so being her father and master as aforesaid; and thereby the said plaintiff was, during all the said nine months, deprived of the service of his said daughter and servant, to wit, at &c. aforesaid; and was obliged to expend, and did expend, divers large sums &c. of money, in the whole amounting to \$—, in the nursing of his said daughter and servant, and in the delivery of the said child, &c. &c.

NOTE. This action for the seduction of a daughter, may be maintained, if the daughter is actually in her father's service, or lives in his family, whether she is under or over twenty one. 2 T. R. 166; Peake's N. P. 55. But if she is of age and in another's service at the time of seduction, he can maintain no action. 5 East, 45. But if the seducer hires her into his service for the purpose of seduction, the father may maintain this action. 2 Starkie, 493. If acts of service are proved, though the daughter does not sleep under her father's roof, he may maintain this action. 5 T. R. 360. And if she is under age and the father has a right to her services, though she does not live in his family, this action may be maintained. 8 Serg. & Rawle, 36.

For the seduction of an adopted daughter, this action may be maintained, and vindictive damages given. 11 East, 23.

So for seducing away a mere menial servant and debauching her. Peake's N. P. 55.

In this action it is not necessary to show, that the defendant knew she was plaintiff's servant, as it is usually in cases of enticing away servants, apprentices, &c. *Ibid.*

The father cannot maintain this action, if he knowingly suffers his daughter to receive the visits of a married man familiarly. Peake's N. P. C. 240.

If the seduction took place in the father's house, it is better to bring Trespass *quare clausum fregit* in one count, and allege the seduction as an aggravation of damages. See under the head of *quare clausum fregit, post.*

And the action lies without doubt for the seduction of any inmate of a man's family who is not a mere boarder.

For crim. con. with plaintiff's wife. See Case, p. 457; see also under quare clausum fregit.

For that the said D, heretofore, viz, on &c., at &c., with force and arms, assaulted and ill treated E G, then and there being the wife of the plaintiff, and then and there de-

bauched and carnally knew her, whereby the plaintiff for a long space of time, *viz.* from thence hitherto, hath been wholly deprived of the comfort, fellowship and assistance of his said wife, which during all the said time he otherwise would have had, &c.

NOTE. This action is transitory. To maintain it, a marriage must be proved. 1 Doug. 171; 4 Bur. 2057. If the husband and wife have agreed to live separately, no action can be maintained. 5 T. R. 357. But, where a deed, between husband and wife, contained a proviso, that, on the happening of a certain event, the wife should be allowed to live separate, if the trustees consented; and the wife separated without such consent, and afterwards committed adultery, it was held, the husband might sue the adulterer. 6 East's R. 644; 2 Smith, 356. Negligence in the husband, or loose and improper conduct, and even adultery in him, furnishes no defence in this action; but they go in mitigation of damages. 4 T. R. 657; 4 Esp. R. 237. But if the adultery takes place with his express or implied consent, no action can be maintained. *Ibid.*

For an assault and battery of plaintiff's wife, whereby she miscarried.

For that the said D, on &c. at &c., with force and arms, assaulted one A B, then and still being the wife of the plaintiff, and who was then and there pregnant with child, and then and there beat, bruised, wounded, and ill treated the said A B, and then and there pulled a chair, whereon the said A B was sitting, from under the said A B, with so much violence, that the said A B then and there fell upon the ground, and thereby was greatly terrified and hurt; by means whereof the said A B afterwards, and before the natural time of delivery, to wit, on &c., at &c., was taken in labor, and was delivered of a dead child; and afterwards continued sick and disordered a long space of time, *viz.* six weeks, then next following; whereby the plaintiff, during all the time last mentioned, was deprived of the fellowship and assistance of his wife, and afterwards, *viz.* on &c., at &c., was obliged to expend, and did expend, a large sum of money, *viz.* \$—, in the necessary care and nursing of his said wife, &c. &c.

For an assault and battery, and false imprisonment, and selling plaintiff as a slave in a foreign port.

For that the said D, on &c., at &c., in parts beyond seas, to wit, at S aforesaid (*the proper venue,*) with force and arms, assaulted the plaintiff, then being on board the ship A, lying in the said port, and then and there beat, bruised, wounded and ill treated him, and then and there tied the plaintiff to a certain cannon, and kept him so tied for a long

space of time, *viz.* ten hours, and then and there by force and against the will of the plaintiff, took and carried him from on board the said ship, on shore in the said port, and then and there sold and disposed of the plaintiff, as a slave, and then and there left the plaintiff in a state of slavery and bondage; whereby the plaintiff was kept and continued in servitude and slavery in the said port, *viz.* at &c. aforesaid, a long space of time, *viz.* — years, and during all that time, was obliged to endure, and did endure great privations and inhuman and barbarous punishments, and was nearly starved for want of necessary food; and was put to great expense, and did expend a large sum of money, *viz.* the sum of \$—, in liberating himself from said slavery and bondage, and in procuring a passage home, from the said port of &c. to &c., within this commonwealth, &c.

Parts of declarations in Trespass, for various batteries and injuries, which may be introduced according to circumstances.

For breaking plaintiff's arm.

— and then and there struck the plaintiff divers violent and grievous blows on the right arm of plaintiff, so that the same was thereby broken; whereby the plaintiff was wholly deprived of the use of his said arm for a long space of time, *viz.* two months, and was obliged to expend, and did expend a large sum of money, *viz.* \$— in the cure of the same, and by reason thereof has suffered great pain and anxiety.

For keeping plaintiff confined in prison, in consequence of which he had fits.

— and then and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable cause, for a long time, *viz.* six weeks, against the will of the plaintiff; whereby the plaintiff, during all that time, became afflicted with divers epileptic fits and other convulsions, fits and diseases, of mind and body, and was then and there obliged to expend, &c.

For shooting the plaintiff, &c.

— and with a certain pistol, charged and loaded with gunpowder, and leaden bullets, which the said D then and there held in his hand, and aimed and directed towards and at the plaintiff, the said D then and there, shot at, hit, and wounded the plaintiff in his right shoulder, in so grievous a

manner, that the plaintiff then and there lost great quantities of blood, and his life was endangered and despaired of; by reason whereof the said plaintiff wholly lost the use of his right arm for a long space of time, &c.

2. *Trespass quare clausum fregit.*

For breaking and entering plaintiff's close.

For that the said T, on &c., and on other days and times between that day and the day of the purchase of this writ, with force and arms, broke and entered the plaintiff's close, situate in &c. (*describe it particularly to avoid a new assignment,*) and then and there forced and broke open, damaged, and spoiled a gate of the plaintiff, of great value, viz. of the value of \$—, then standing in the said close, and the locks, staples, and hinges of the said plaintiff, of great value, viz. of the value of \$—, affixed to the said gate, and with which the same was locked and fastened; and with feet in walking, trod down, trampled upon, and spoiled the grass and corn of the plaintiff, of great value, viz. of the value of \$—, there then growing; and with cattle, viz. horses, cows, oxen and sheep, ate up and depastured the grass and corn of the plaintiff of great value, viz. of \$—, then growing and being in the said close; and with divers other horses, cattle, and sheep, and also with the wheels of divers carts, wagons, and other carriages, crushed, damaged, and spoiled, other the grass and corn of the plaintiff, of great value, viz. of the value of \$—, there then also growing and being, and with the feet of the said horses &c. and with the wheels of the said carts &c., tore up, damaged, and spoiled the earth and soil of the said close; and also then and there mowed and cut down the grass and corn of the plaintiff then growing in the said close, and then and there took and carried away the hay and corn, to wit, — cart loads of hay and — cart loads of corn of the plaintiff, of great value, to wit, of the value of \$—, off and from the said close, and converted and disposed thereof to his own use; and also then and there cut down and destroyed the trees and underwood, to wit, (*state the particulars*) and other trees, and — acres of underwood of the plaintiff, of great value, viz. of the value of \$—, and the timber, wood, branches, and bushes thereof, coming and arising, to wit, — loads of timber, — cords of wood, &c. of the plaintiff, of great value, viz. of the value of \$—, took and carried away, and

converted and disposed thereof to his own use ; and also, then and there, broke down and destroyed a great part, *viz.* — rods of the fence of the plaintiff, of and belonging to the said close ; and also then and there placed and erected divers, *viz.* — stalls, and — booths, in and upon the said close, and kept and continued the said stalls and booths so there placed and erected, without the leave or license, and against the will of the plaintiff, for a long space of time, *viz.* from —, hitherto ; and thereby and therewith, during all the time aforesaid, greatly incumbered the said close, and prevented the plaintiff from having the use thereof, in so ample a manner, as he otherwise would have done, *viz.* at — aforesaid, &c.

NOTE. The declaration in Trespass *quare clausum fregit*, must set forth a trespass, committed to real estate in the county where the action is brought. If the description is general, and the defendant pleads *liberum tenementum*, the plaintiff must make a new assignment, describing the place, where the trespass was committed, with proper certainty. To avoid this necessity, it will often be better, if there is sufficient time before the commencement of the suit, to get a precise description of the real estate, to set it out with sufficient certainty in the declaration. Great care, however, is necessary here, to avoid a mistake in the boundaries or description ; as a material variance from the fact will be fatal. 1 Taunt. 495 ; 1 Saund. 299 ; Willes R. 223 ; 1 Salk. 453.

A declaration in Trespass, for a trespass committed to real estate, may be laid with a *continuando* from such a day to such a day, when the trespass, from its nature, is capable of a continuance. But where the trespasses, however numerous soever, terminate each in a single act, it is repugnant to allege the commission of them with a *continuando* ; they should then be alleged as having been committed at different days and times between such a day and such a day. The following instances may serve in some measure for illustration.

1. *Trespases, the commission of which may properly be alleged with a continuando.*

Breaking and entering the plaintiff's house or close ; 1 Sid. 319 ; *Ld. Raym.* 240. Spoiling his grass, cutting his corn, cutting down his wood, &c. *Ibid.* Trampling down grass, &c. with the feet in walking. *Mod.* 179. These, it is obvious, are trespasses that may be continued.

2. *Trespases, the commission of which ought not to be alleged with a continuando.*

The act of a man cannot properly be laid with a *continuando*, because necessarily interrupted by sleep, meals, &c. This is a general rule, but liable to some exceptions. 1 Sid. 319 ; *Salk.* 639.

Throwing down a house, taking loose chattels, and any other act that terminates in itself, as the killing of a horse, &c., should not be laid with a *continuando*. See *Ld. Raym.* 240.

3. It seems that acts which may be done by piecemeal, may be alleged with a *continuando*, but then they should be alleged to be so done. For if the whole is alleged to be done on the first day, it is repugnant to good sense, to allege the trespass afterwards with a *continuando*. But after all, many of the difficulties which arise on this subject, may be re-

ferred to mere inaccuracy of expression. See more on this subject. Viner's Abridgment, Trespass, (L) (1, 2.) (K.); Com. Dig. Trespass, (3 M, 10); 5 Bac. Abr. 192, &c.

For pulling down plaintiff's house and carrying away the materials, &c.

For that the said T and E, on &c., with force and arms, broke and entered the plaintiff's house, at &c. aforesaid, and pulled down part of the said house, to wit, fifty square yards of the walls, fifty square yards of the floors, and fifty square yards of the roof thereof, and the materials of the said part of the said house, so pulled down, to wit, fifty cart loads of stones, fifty cart loads of bricks, fifty cart loads of ules, &c. of the value of \$—, took, carried away, and converted and disposed of to their own use; and other wrongs, &c.

*For breaking plaintiff's close and pulling down fence and spoiling trees,
(various counts.)*

1st Count. — For that the said A, on &c., with force and arms, broke and entered the plaintiff's close, lying in said —, containing &c., bounded &c., and her grass and herbage there growing, of the value of \$—, with certain beasts of the said A, viz. his horses, oxen, cows, sheep, and swine, trod down and consumed; and there continued the same trespass, at divers days and times, from &c., to &c., and divers trees, viz. twenty trees, of the value of \$—, standing and growing in and upon the said close, on the said last day of &c., and on divers days and times between that day and the — day of &c., with force as aforesaid, with his beasts aforesaid, cropped and spoiled.

2d Count. — And for that the said A, at &c., on &c., with force and arms, and with a design to injure the plaintiff, did throw down and lay open certain fences belonging to and inclosing the said close, viz. twenty rods thereof, to the value of \$—, and left the same open, and carried away the materials with which the same twenty rods of fence had been erected, against the law in such case made and provided; whereby the said close was, from &c., to &c., laid open and exposed; and the cattle of the said A, other than those before mentioned, and the cattle of one P, and of several other persons unknown to the plaintiff, thereby, and through the said opening, made by taking away the same twenty rods of fence as aforesaid, on divers days and times, between —, and the — day of &c., entered into the said close, and greatly injured the same, and spoiled the trees

and grass there standing and growing; by all which the plaintiff lost the profits of her said close for the time aforesaid, and sustained other damage; and other wrongs to the plaintiff the said A then and there did, which is against the peace.

3d COUNT. — And for that the said A, at &c., on &c., and on divers days and times between — &c., divers other trees, standing and growing in and upon the said close, with force and arms destroyed, cut, felled and carried away, to wit, fifteen trees of five inches over, each of the value of \$—, against the form of the statute in such cases made and provided.

4th COUNT. — And for that on &c., and at divers days and times between &c., the said A, at &c., with force and arms, did pull down and throw open other twenty rods of the plaintiff's fence, belonging to and enclosing said close, of the value of \$—, against the statute in such cases made and provided.

5th COUNT. — And for that the said A, at &c., on &c., with force and arms, and with the design to injure the plaintiff, did pull down and throw open other twenty rods of fence belonging to and inclosing the said close of the plaintiff, of the value of \$—, against the form of the statute in such cases provided; and other wrongs then and there did against the peace. By reason of the premises, and by force of the same statute, the said A hath forfeited \$— to the plaintiff for each and every tree of five inches over, as aforesaid, last mentioned, and for every trespass of pulling down and throwing open said fences, in the fourth and fifth counts in this declaration mentioned, a sum not exceeding \$—, and treble damages. And an action hath accrued to the plaintiff to sue for and recover the several sums forfeited as aforesaid, and the treble value and damages aforesaid; all which trespasses and wrongs are to the damage, &c. **DANE.**

Same on land in right of wife, by baron and feme.

For that the said A, on &c., with force and arms, did break and enter the plaintiff's close, in her right, situate, &c. bounded &c., containing — acres, and their grass there growing did tread down and consume; and then and there, with force as aforesaid, did throw down ten rods of the plaintiff's wall, belonging to and inclosing the said close, and

carried away the rocks and stones thereof; and other wrongs to them did, against our peace, and to the damage of the said B, and C, his wife, &c. *Cro. Eliz.* 96, 133; See *Basely v. Clarkson*, 3 *Lev.* 37. DANE.

For mesne profits.

For that the said A, on &c., with force and arms, broke and entered a certain tenement of the plaintiffs, situate &c., bounded &c., and kept the plaintiff from the use, possession, and improvement of the said tenement, being of the yearly value of \$—, from &c. to the day of the purchase of this writ; whereby the plaintiff hath lost the whole benefit and profit of the tenement aforesaid; and other enormities the said A, did in the time aforesaid, contrary to our peace, &c. *Sty. Pr. Reg.* 528. THACHER.

The same.

For that the said A [defendant,] on &c., broke and entered the plaintiff's close in &c. aforesaid, containing &c., bounded &c., and the plaintiff's dwellinghouse thereon standing, and for a long time, *viz.* from the said — day of &c., to the — day of &c., hindered and kept the plaintiff out from the use, possession, and occupation, and benefit of the close and dwellinghouse aforesaid; whereby the plaintiff, for all the time aforesaid, lost, and was deprived of the profit and benefit of the close and dwellinghouse aforesaid, and also lost, and was deprived of the use and benefit of — acres of other land, adjoining to the close aforesaid, for all the time aforesaid; and other injuries the said A then and there did and committed, within the time aforesaid, to the plaintiff, against our peace, &c.

For entering plaintiff's close and cutting down trees.

To answer to the inhabitants of the third parish in the town of Reading, in a plea of trespass; for that the said D [defendant] at said Reading, on &c., and on divers other times, between that day and the day of the purchase of this writ, with force and arms, broke and entered the close of the said inhabitants, there lying in a place called —, in said Reading, containing &c., formerly part of the estate of one B, and, by the said town of Reading, duly granted and confirmed to the inhabitants of said third parish. And the said D, being so entered then and there, with force as aforesaid, having no privilege or right, without leave or license,

cut down and carried away one hundred large trees of the plaintiffs, there growing, of the value of \$— each; and also, with force as aforesaid, carried away from thence, — cords of wood of the plaintiffs, there lying, of the value of \$—; and also, with force as aforesaid, carried away from thence, other — cords of wood, of the value of \$—; and many other injuries and enormities the said D, being so entered, with force as aforesaid, then and there did and committed against the plaintiffs, and against our peace, &c.

J. QUINCY.

3. Of joining *Trespass quare clausum fregit*, with other trespasses.

In joining *Trespass quare clausum fregit*, in the same declaration with other trespasses, there are a number of particulars deserving attention.

If the breach of the close is the principal grievance, and taking away goods, &c. merely aggravation, there is not the same necessity for certainty in the description of the goods, that there is, where the declaration is merely for the trespass in taking the goods. In the latter case, the declaration might be bad on demurrer. 5 Co. 34, b; Cro. Jac. 435. But in the former case, the breach of the close would be sufficient to sustain the action. 2 Saund. 74. But if the trespass in breaking the plaintiff's close, is in reality the aggravation, though in the declaration it appears to be the principal trespass, and the other wrong is in fact the principal cause of action, it may be worth while, in some cases, to consider whether it would not be better to waive the breach of close, and go for the true cause of action alone. Thus, suppose the cause of action to be the seduction of the plaintiff's daughter, and that it took place in the plaintiff's house, the plaintiff in that case may declare for the breaking and entering of his house, and the debauching of his daughter will appear to be merely matter of aggravation. But it is apparent, that the last is the principal grievance, and the circumstance that it took place in the plaintiff's house, is matter of aggravation only. Now *Trespass quare clausum fregit* is local, and the action must be brought in the county where the house is situated, and if it should happen that neither plaintiff nor defendant is resident in that county, and it should appear that defendant had an express or implied license to enter the plaintiff's house, of which great intimacy will be considered evidence, the plaintiff must fail in his action, though he proves the seduction of his daughter. In practising under the statute, which requires the action to be brought in the county where one of the parties resides, it would therefore be better, unless there are some other considerations to the contrary, to waive the illegal entry into the plaintiff's house, so that the action may become transitory. Still, if there are any circumstances attending the seduction of the daughter, which render it doubtful whether an action can be maintained for that alone, it would be better to bring *Trespass quare clausum fregit*, and join the seduc-

tion of the daughter as matter of aggravation. The same reasons apply to any other trespasses, for which a transitory action lies, when joined with Trespass *quare clausum fregit*.

For breach of close ; and amotion of plaintiff from possession, with continuando.

For that the said D and E, on &c., at &c., with force and arms, broke and entered the plaintiff's dwellinghouse situate at &c., and made a great noise and disturbance there, and staid in the said dwellinghouse, without the license and against the will of the plaintiff, continuing such their noise and disturbance therein for a long time, *viz.* for the space of three days, and during all that time, greatly disturbed the plaintiff in his quiet possession thereof, and expelled and ejected him therefrom for a long space of time, to wit, from thence hitherto, &c. &c.

For breach of close ; making an affray ; and seizing and carrying away plaintiff's goods.

For that the said T, on &c., at &c., with force and arms, broke and entered the plaintiff's dwellinghouse, there situate, and then and there made a great noise and affray therein, and then and there seized and took possession of the goods and chattels of the plaintiff, *viz.* one mahogany table, of the value of \$—, one framed saw, of the value of \$—, &c. &c., and kept possession of the said goods and chattels, and remained and continued in the possession of the said dwellinghouse, for a long space of time, *viz.* for the space of — days, and *until the plaintiff was obliged, at considerable trouble and expense, to replevy the same, viz. at &c. &c. ; or, until the plaintiff was obliged to lay out a large sum of money, viz. the sum of \$—, for the recovery of the said goods and chattels, and other wrongs, &c. &c.*

For breach of close ; seizing stock, &c. ; working up materials ; conversion, &c.

For that the said D and E, on &c., at &c., broke and entered a certain salt manufactory of the plaintiff, there situate &c., and there seized and took possession of divers goods and chattels of the plaintiff, there then found, *viz. (specify the articles)* and being in the whole of great value, to wit, of the value of \$—, and which belonged to the said salt manufactory ; and staid and continued in the said salt manufactory, and in possession of the said goods and chattels, for a long space of time, *viz.* — days, and during that time, at

and in the said manufactory, and by and with the fires, materials, and utensils of the plaintiff there then found, and belonging to said manufactory, made, converted, and manufactured the said (*the materials,*) and afterwards took and carried away the same, and also the said &c., so by them seized and taken as aforesaid, from and out of the said salt manufactory, and from and out of the possession of the plaintiff, to places by the plaintiff unknown; whereby and in consequence of such seizure, and of other the premises aforesaid, the plaintiff was deprived of his said goods and chattels, and of the profits that would have accrued to him from the use and sale thereof, and was, during all the time aforesaid, disturbed in the possession and occupation of his said manufactory, and was, during such time, and for a long time afterwards, prevented from following the business of a manufacturer of salt, by him at other times carried on, at the said manufactory, and was also obliged to pay, and did pay, a large sum of money, to wit, \$—, and was otherwise put to great trouble in endeavoring to obtain restitution of the said property, so by them seized as aforesaid; and other wrongs, &c.

For entering a dwellinghouse; making a riot there, expelling plaintiff, &c.

For that the said D and E, on &c., with force and arms, broke and entered the dwellinghouse of the plaintiff, situate &c., and thereby greatly disturbed the plaintiff in the quiet possession of the said dwellinghouse, and then and there broke down a certain fire-grate, of the plaintiff, of the value of \$—, and then and there broke to pieces, damaged, and spoiled, the said fire-grate; and then and there seized, and took divers goods, chattels, and furniture, to wit, (*set out the goods*) of the value of \$—, in the said dwellinghouse, then and there being, and with great violence, threw and cast the said goods &c. of the plaintiff, out of the said dwellinghouse, into the public street or highway in said &c., adjoining to the said dwellinghouse, and thereby then and there greatly soiled, broke, damaged, and spoiled the said goods &c.; and then and there, with strong hands, expelled and put out the plaintiff with his family from the possession and occupation of the said dwellinghouse, and kept the plaintiff with his family, so expelled and put out from the possession and occupation of the said dwellinghouse for a long space of time, then next following, to wit, from thence until the day of the purchase of this writ, whereby the plaintiff, dur-

ing that time, not only was deprived of the use and occupation of the said dwellinghouse, but was also thereby greatly injured and obstructed in his necessary affairs and employment, by him during that time to be done and followed, and was put to great labor and trouble, and obliged to expend a large sum of money, *viz.* the sum of \$—, in obtaining and furnishing another dwellinghouse for himself and family, to wit, at &c.

For breaking plaintiff's close ; pulling down a shed ; erecting a house, &c.

For that the said D and E, on &c., at &c., with force and arms, broke and entered the close of the plaintiff, there situate, called &c., and then and there trod down and spoiled the grass of the plaintiff, there then growing, and being of a large value, *viz.* of the value of \$—, and then and there threw down and prostrated a certain building of the plaintiff, of a large value, *viz.* of the value of \$—, then and there erected, called &c., and the materials thereof coming, *viz.* — loads of bricks, of the plaintiff, of the value of \$—, took and carried away, and converted and disposed of, to the use of the said D and E, and then and there dug up and subverted the soil and earth, together with other the grass of the plaintiff, then and there respectively growing and being, of a large value, to wit, of the value of \$—, and then and there erected and built a great part of a certain messuage or dwellinghouse in and upon the said close, and then and there put out and expelled the plaintiff from the possession and occupation of a great part of his said close, and kept and continued him so put out and expelled, and the said part of the said messuage or dwellinghouse, so by them erected on the said close as aforesaid, for a long time, to wit, from thence hitherto ; whereby the plaintiff, during all that time, hath lost, and by reason of the said last mentioned building, will hereafter lose and be deprived of the free and entire use and occupation of his said close ; and other wrongs, &c. &c.

For breaking plaintiff's close, taking away his mare, and converting her, &c.

For that the said D, on &c., at &c., with force and arms, broke and entered a certain close of the plaintiff, situate &c., and then and there, with his feet in walking, trod down, and spoiled the grass of the plaintiff, there then growing, of the value of \$—, and then and there, with force and arms, took and led away a certain mare of the plaintiff, there

then being, of great value, *viz.* of the value of \$—, and kept and detained, and still keeps and detains the same; or, and converted and disposed thereof to his own use; and other wrongs, &c.

4. *Trespass to personal property.*

For taking and carrying away the plaintiff's goods, and converting them to the defendant's use.

For that the said D, on &c., at &c., with force and arms, took and carried away the goods and chattels, *viz.* three butts of beer, seventy pounds of butter, &c. &c.; then and there found and being, of great value, to wit, of the value of \$—, and converted the same to the use of the said D, against the peace of the commonwealth, and to the damage, &c.

NOTE. In Trespass for taking and carrying away the plaintiff's goods, it is absolutely essential to state, that the goods were the plaintiff's goods; the plaintiff's title to recover rests on that point, and the omission is not cured by a verdict. *Strange*, 1023; 2 *Lev.* 156; 2 *Cro.* 46; *Salk.* 640. But if the defendant's plea shows that the goods were in the possession of the plaintiff, the declaration will be aided. 1 *Sid.* 185.

The goods must be set forth with certainty, in the declaration, so that the defendant may be able to justify; or, in case of a recovery against him, to plead it in bar of another action for the same goods. See 5 *Co.* 34, b; 4 *Bur.* 2455; 3 *Wils.* 292.

The value of the goods should be mentioned. 2 *Lev.* 230; 2 *Cro.* 307. The omission to state the value of the goods, is aided by a verdict, but uncertainty in specifying the goods is not. *Com. Dig. Plead.* 3 *M.* 5. (*Edition*, 1822.) This action is transitory.

For seizing two silver tickets of the plaintiff, whereby he was prevented from getting admission into a place of entertainment.

For that the said D, on &c., at &c., with force and arms, took and carried away two silver tickets of the plaintiff, of great value, *viz.* of the value of \$—, being tickets entitling the plaintiff, and the bearer and bearers thereof, for the time being, to admission &c. (*according to the fact, or the face of the ticket,*) during the performances and exhibitions from time to time, taking place there, and which said tickets were transferable by the plaintiff, as proprietor of the same, to any other person or persons for the purpose of procuring such person or persons admission to the said (*place of exhibition,*) and withheld and detained the said tickets from the plaintiff for a long space of time, to wit, from thence hitherto; whereby the plaintiff, during all that time, hath been prevented from gaining admission into the said (*place*

of exhibition) at and during the performances and exhibitions which have taken place there, by virtue of the said tickets; and hath, during all that time, been prevented from transferring or letting out the same tickets to any other person or persons, for the purpose of entitling such person or persons to admission into the said (*place of exhibition*;) during the said performances and exhibitions there, and particularly to one A B and one C D, who would otherwise respectively have hired the said tickets of the plaintiff, during certain periods of performance at the said place of exhibition, during the time aforesaid; and the plaintiff hath thereby been deprived of an opportunity of making, and hath lost a large sum of money, *viz.* \$—, which he could otherwise have acquired, and which would have accrued to him from such transferring or letting out of the said tickets, *viz.* at &c. aforesaid.

For stopping plaintiff's dray, and seizing a bridle, &c.

For that the said D, on &c., at &c., with force and arms, stopped a certain dray of the plaintiff drawn by certain cattle of the plaintiff along the highway in said &c., and seized and took from the head of one of the said cattle, then drawing the said dray, a certain leather bridle of the plaintiff, of the value of \$—, and *kept and detained the same for a long time, and until the plaintiff was forced to pay, and did pay to the said D the sum of \$—, for the redemption of the said bridle, &c.*

or, *instead of the words in italics,*

and carried away the same, and converted and disposed thereof to his own use, &c.

For shooting plaintiff's dog.

For that the said D, on &c., at &c., with force and arms, shot and killed a certain dog of the plaintiff, then and there found and being, of great value, *viz.* of the value of \$—, and other wrongs, &c.

See ante, under case for misfeasance.

For killing plaintiff's horse.

For that the said D, on &c., at &c., with force and arms, beat, bruised, wounded and ill treated a certain gelding of the plaintiff, then and there found and being, of great value, *viz.* of the value of \$—, so that the said gelding languished

of the bruises and wounds then and there given, for a long time, and the plaintiff was then and there obliged to lay out and expend, and did lay out and expend a large sum of money, *viz.* \$—, in endeavoring to cure the said gelding, during that time, and the said gelding afterwards, on &c., at &c., by means of the said wounds and bruises, died, &c. &c.

or, *more shortly thus*,—

For that the said D, on &c., at &c., with force and arms, beat, bruised, wounded and killed a certain gelding of the plaintiff, then and there found and being, of the value of \$—, and other wrongs, &c., &c.

For knocking out the eye of a horse.

For that the said D, on &c., at &c., with force and arms, *viz.* with a certain stick or bludgeon, which the said D, then and there held in his hand, beat, bruised, wounded and ill treated a certain mare of the plaintiff, then and there found and being, of great value, *viz.* of the value of \$—, and did then and there, violently knock and strike out one of the eyes of the said mare; by reason whereof the value of the said mare is greatly diminished; and other wrongs, &c.

For chasing sheep with dogs, &c.

For that the said D, on &c., at &c., with force and arms, drove, and with dogs, chased certain sheep and lambs of the plaintiff, *viz.* ten sheep and six lambs, then and there found and being, of great value, *viz.* of the value of \$—, and then and there set on and encouraged the said dogs to bite, worry and pursue the said sheep and lambs, whereby divers, *viz.* three of the said sheep and five of the said lambs, died, and the residue of the said sheep and lambs, *viz.* seven sheep and one lamb, were greatly hurt and damaged; &c. &c.

NOTE. Under the Rev. Stat. of Mass. ch. 58, sec. 13, trespass lies against the owner *or* keeper of a dog, for mischief done by him.

If in the declaration, the defendant is described as owner *and* keeper, it must be proved that he is both owner and keeper. But the fault may be amended according to the fact. *Buddington v. Shearer*, 20 Pick. 477.

Where mischief is done by two dogs together, belonging to several owners, each is answerable for the mischief done by his own dog only, in a several action of trespass. *Ibid.* See also, 2 Conn. R. 206.

For chasing a mare whereby she dropped a dead foal.

For that the said D, on &c., at &c., with force and arms,

drove and chased a certain mare of the plaintiff, then and there found and being, of great value, viz. of the value of \$—, whereby the said mare, then and there slipped and dropped a dead foal, and whereby the said mare was then and there hurt and greatly damnified, and the plaintiff was deprived of the use of the said mare, for a long space of time, viz. six weeks, &c. &c.

For seizing and detaining plaintiff's barge.

For that the said D, on &c., at &c., with force and arms, seized and took a certain barge of the plaintiff, of great value, viz. of the value of \$—, and then and there carried away the said barge, and kept and detained the same from the plaintiff for a long space of time, viz. from thence hitherto, and converted the same to his own use; whereby the plaintiff has been deprived of all the profit and advantage which would have accrued to him from the use of the said barge during that time; and particularly (*state the special damage, if any,*) &c., and other wrongs, &c.

For running a carriage against the plaintiff's, whereby he was thrown out, with special damage, &c.

For that the said D, on &c., at &c., with force and arms, drove a certain carriage, to wit, a curricule, which the said D was then and there driving along the highway, with great force and violence, against a certain other carriage, viz. a chaise of the plaintiff of great value, to wit, of the value of \$—, and in which said chaise, the plaintiff was then riding in the said highway, and thereby then and there greatly broke and damaged the said chaise; by means whereof the plaintiff was then and there thrown, with great violence, out of his said chaise, upon the ground; and was afterwards, viz. on &c., at &c., obliged to expend, and did expend, a large sum of money, viz. \$—, in the repairing of the said chaise; and also by means of the premises, the plaintiff was then and there greatly bruised, hurt, and wounded, and sick and disordered, and so continued for a long space of time, viz. — weeks, then next following, and during all that time was prevented from transacting his lawful business, by him during the said time to be transacted; and was also thereby obliged to expend, and did expend a large sum of money, viz. \$—, in the cure of his said wounds, lameness, and disorders aforesaid, occasioned as aforesaid, viz. at &c., and other wrongs, &c. &c.

NOTE. In what cases to bring Trespass, and in what to bring Case, it is not always easy to decide. See *ante*, Case.

For setting plaintiff's barge adrift; special damage.

For that the said T, on &c., at &c., with force and arms, seized and took the boat of the plaintiff, of great value, viz. of the value of \$—, then moored and fastened with a certain rope of the plaintiff, at &c., in the river &c., and then unmoored and set loose the said boat from the place to which she was so moored and fastened as aforesaid, and thereby set the said boat adrift in the said river; whereby the said boat was broken to pieces, damaged, and spoiled, and the plaintiff lost the whole use of his said boat for a long space of time, viz. &c. &c.

For impounding the cattle of plaintiff until he paid a sum of money.

For that the said E, together with one G G, of &c., on &c., at &c., with force and arms, the cattle, to wit, four oxen and four cows, of the said P P, there lately found, took, and impounded, and them there so impounded, detained, until the said P P, for obtaining the delivery of them therefrom, paid to the said E and G a fine of \$12; and other enormities, the said E then and there did, to the grievous injury of the said P, and against the peace, &c. 2 Vent. 91.

Trespass on a flock of geese.

For that the said D, on &c., at &c., with force and arms, chased and worried the plaintiff's flock of geese, being in all &c., threw clubs and stones at them, and thereby killed — of them, of the value of \$—, and wounded and hurt the rest, to the value of \$—, against the peace, &c.

For rescue of a horse.

For that the said plaintiff, on &c., at &c., had taken a certain mare, doing damage, then in the lands of the plaintiff, and had imponuded the said mare according to law. And the said A, on &c., at &c., with force and arms, viz. with swords and staves, broke said pound, and took and led away said mare from and out of said pound; and other wrongs, &c.

Part-owner and master, for detaining a ship and cargo.

For that on &c. at &c., the said A, with force and arms, did arrest a certain ship in the custody of the plaintiff, with

which, and divers goods and merchandises, *viz.* &c. of him the plaintiff, and several other merchants, his partners, in the said ship to be transported, the plaintiff was about to go to parts beyond sea, *viz.* to &c., and to make profits thereof to him, the plaintiff, for his part, *viz.* one fourth part thereof, and to take of every of the said other merchants a certain salary, *viz.* one twentieth part of the produce thereof, to merchandise their parts of the said goods and merchandise; and said ship, so under arrest, there did detain, against the law of the land, for a long time, *viz.* from &c., to &c.; whereby the plaintiff, the profit and advantage, which he must have had and received from the goods and merchandises aforesaid, by merchandising thereof as aforesaid, hath totally lost; and other outrages the said A did on the plaintiff commit, against the peace, &c.

See Boyd v. Brown, 17 Pick. 453, and *White v. Damon*, 8 Pick. 356.

For killing plaintiff's horse on training day by shooting with a gun.

For that on &c., at &c., the said A, with force and arms, a certain hand-gun, laden with gunpowder, discharged at and against the plaintiff's horse, being a gelding, of the value of \$—, and thereby broke the right thigh-bone of said horse, and wounded him in said thigh; so that by means thereof, the said horse was rendered useless and good for nothing; and then and there the said A did other injuries to the plaintiff, against our peace, &c. TROWBRIDGE.

For taking plaintiff's boat.

For that the said A [defendant,] on &c., at &c., with force and arms, took and carried away the plaintiff's two-mast boat, of the value of \$50, and converted the same to his own use; and other enormities to the plaintiff, the said A then and there did, against the peace of this commonwealth, &c.

For stopping plaintiff's wagon in the highway.

For that the said T, at &c., on &c., with force and arms, stopped a certain wagon of the plaintiff, then and there by the plaintiff's cattle drawn in and along the highway, and seized and took from the cattle, then and there drawing the said wagon, the gears of the plaintiff, *viz.* one pair of iron gears, of the value of \$—, and carried away, kept, and detained the same; and other injuries, wrongs and enormities

the said T then and there did to the plaintiff, against our peace, &c.

5. *Declarations in other cases of mixed trespasses.*

For mesne profits.

For that the said T, on &c., with force and arms, broke and entered three messuages &c., with the appurtenances in — aforesaid, and expelled, put out, and removed the plaintiff from the possession and occupation of his said tenements, and kept and continued the plaintiff so expelled, put out, and removed from the possession and occupation of the same, for a long space of time; that is to say, from —, until the day of suing out the original writ of the plaintiff; and during all that time, had and received to his own use, all the rents, issues, and profits of the said tenements, being of the yearly value of \$—, and other injuries, &c.

NOTE. In England, after a recovery in ejectment, the owner of the land may recover for the time he has been kept out of possession, in an action for the mesne profits. The reason of this is, that the tenant in possession, by entering into the common rule, is estopped in any subsequent action, from denying the lessor's possession, and an ouster by himself. This ouster affords a sufficient foundation for the lessor's action of Trespass, in which he recovers damages, in lieu of the mesne profits, which he has been prevented from receiving. It should be remarked, however, that where the profits claimed, are for a greater length of time than six years, the defendant may plead the statute of limitations. It should be observed, too, that the jury, in assessing damages in such action, are by no means obliged to confine themselves to the annual rents of the land, but may, in every such case, assess such damages, as they think will do justice between the parties. And a learned judge on the English Bench, (Mr. Justice Gould, 3 Wils. 118,) remarks, that he had known four times the value of the mesne profits given by a jury in this action. Whether it would be worth while to make a suggestion of this kind to the jury, in cases where the defendant sets up the statute of limitations against the plaintiff's claim, to prevent him from recovering more than what is not within the statute, may be worth consideration; in order that complete justice, either *per directum* or *per obliquum*, may be done between the parties. Since those who apply to an arbitrary regulation of the law, grounded merely in policy, to shelter them from a just claim, must, in that case, as well as where they apply to the law for the recovery of a legal demand, be content to take the law as they find it.

In Massachusetts, the action of ejectment has never been adopted in practice, and much of the English law in relation to this subject, has therefore no application here. In this commonwealth, if a man is disseized, he may recover for the trespass, committed in the first disseizin, without entry. But he recovers no mesne profits; but if he re-enters, and then brings his action of Trespass with a *continuando*, or if, after a re-entry, he is content to waive the Trespass and bring an action of Assumpsit, for use and occupation, he may recover the mesne profits, or an equivalent by some other name. But if, after he is disseized, he suffers

his right of entry to be lost by lapse of time, &c., he cannot, with or without entry, maintain an action of Trespass to recover for the mesne profits, or for the use and occupation of the land, in any shape. His remedy then is, to commence a writ of Entry, in which, showing his title, he recovers judgment for the land. After this recovery of judgment, however, before the service of the writ of *habere facias possessionem*, unless he enters by consent, (4 Esp. R. 166,) the demandant is not in possession of the land, so as to maintain Trespass; neither has he any right of entry, independently of the execution. If he had, the execution would be useless; since then he might enter and regain possession without the officer. But after he is put in possession by the officer, he then has a right from that time, to commence actions for trespasses committed afterwards. But according to the strictness of the ancient authorities, he can commence no actions for mesne profits, received before by the tenant or defendant. For, if he has any remedy, it must be in Trespass. But Trespass, it is well known, lies only for injuries done to the possession, and can only be brought by those who were actually, or in consideration of the law, in the possession of the land. But here, so far from being in possession at the time for which the mesne profits are claimed, the demandant or plaintiff had not then even a right of possession. And there is no confession of lease, entry, and ouster, to estop the tenant or defendant. It is plain, therefore, that from the principles of the law, and the nature of the actions to which recourse must be had, if to any, the plaintiff or demandant, in such case, can have no remedy for the mesne profits, unless the action of Ejectment is introduced.

It is said to be an unsettled question, whether, if A disseizes B, and then enfeoffs &c. C, and B recovers the land of C in an ejectment, he shall have an action for the mesne profits against C. Without referring to the numerous cases, dicta, and authorities, each way on this point, it may not be amiss to consider the decision, which a regard to the true merits and justice of the case might dictate. Let a case be put where the right of entry is taken away. Suppose A disseizes B, and then sells the land for \$1000 to C, C occupies the land for twenty years, and clears \$60 per annum, the interest of the purchase money; A also receives the interest of his purchase money, viz. \$60 per annum; B afterwards recovers the land of C, and C then sues A on his covenant of warranty, and recovers the purchase money with interest. But if the matter rests here, justice is not done. For, though A, having received his \$1000, and interest for twenty years, and having afterwards been obliged to refund the whole to C, is neither better nor worse off than he would have been if he had never disseized B; yet C is a great gainer, and B is a great loser by the affair. For C has now, in his hands, not only the \$1000, which he paid A for the land, together with interest for twenty years; but he has also the profits of the land, which he has received, and which he now retains contrary to natural right. These, in the case stated, cannot in round numbers amount to less than \$1400 or \$1500. This money in justice belongs to B. But, for the recovery of this property, no remedy whatever is furnished by any principle of law, acknowledged within this commonwealth; and the statute law is so far from furnishing any, that, if C has laid out the annual rents, which he has received from the land in making improvements, B, when he recovers judgment for the land, must allow him for those improvements which have been made with B's own money. See the various *Betterment acts of this commonwealth*.

But if a case is put where the right of entry is not taken away, for instance, suppose A disseizes B, and, after holding the land two years, con-

veys to C, who occupies the same eight years ; in such case B is under no necessity of bringing a writ of Entry, for he may enter at once. After his entry, however, he cannot maintain Trespass, or any other action against A, for mesne profits, on account of the statute of limitations. For the same reason, he can maintain no action against C, for mesne profits accruing during any time which elapsed more than six years before B's entry. But, for the mesne profits of the six years next preceding B's entry, B, without doubt, may recover against C in an action of Trespass ; or, waiving the trespass, in an action for use and occupation. The reason of this is, that by his re-entry he elects to consider himself as *not disseized* ; and this he may do, because he still retains his right of entry ; and, by this re-entry, A and C become mere trespassers, and each, where the statute of limitations does not interpose, is answerable for the mesne profits which he received in his own time.

But if B, instead of entering, elects to bring a writ of Entry, then he elects to consider himself as disseized, for such is the allegation of the writ ; and whether he can, in that case, after recovery, maintain Trespass for mesne profits, is the principal point in controversy in the case. *Emerson v. Thompson et al.*, 2 Pick. 473.

It may here be observed, 1. That, for a disseizin, a writ of Entry is the proper remedy. 2. That in strictness where a man is disseized, he has neither possession nor right of possession. Because, even if a man is forcibly ejected from his land, and it is fenced off against him, it is nothing more than a mere trespass, unless he elects to consider himself as disseized, and in such case, if he does not, by his negligence, suffer the trespass to be matured into a disseizin by the operation of the statute of limitations, he is under no necessity of bringing any other action than Trespass, after entry ; and, if his entry is prevented, may have recourse to the process of forcible entry and detainer to obtain it. 3. That an action of Trespass lies only for injuries to the possession ; and therefore while a man has neither possession nor a right of possession, he cannot be, either actually or in construction of law, so in the possession of land as to maintain Trespass. 4. That where a man brings a writ of Entry, he admits that the tenant is in possession under title ; and that he, the demandant, is disseized, that is, that his title, upon which his right of possession is grounded, is displaced, and consequently, until the question of title is settled, has no right to the possession of the land. 5. From these premises, if correct (and they are believed to be so,) the conclusion seems to follow, that after a person has alleged in his writ of Entry, *that he has been disseized*, he shall not be permitted afterwards, by bringing an action of Trespass for mesne profits during the time of such disseizin, to contradict himself by saying, *that he then was in possession*. As the court were not unanimous in *Emerson v. Thompson*, it may still be advisable, therefore, in all cases where the right of entry is not taken away, rather to enter, and afterwards bring Trespass, than to resort to a real action ; and, as the right of entry is never taken away by lapse of time, unless where the statute of limitations must necessarily bar the right to recover in Trespass *quare clausum fregit* (the single case of a descent cast, excepted,) there seems to be no necessity that this question should ever arise again.

But now, under the Rev. Stat. of Mass. chap. 101, sect. 14, if the demandant recovers judgment in a writ of Entry, he is entitled to damages in the same action, for the rents and profits, from the time when his title accrued, subject, &c. and damages also for any waste of the buildings, &c. for which the tenant is chargeable by law.

For nailing boards before the plaintiff's windows.

For that the said E, on &c., at &c., with force and arms, put and placed before and against certain windows of the plaintiff, of and belonging to the dwellinghouse of the plaintiff, there situate, divers boards, and nailed and fastened the said boards to the frames of the said windows, and kept and continued the said boards so nailed and fastened as aforesaid, for a long space of time, to wit, from thence hitherto; whereby the light, during all the time aforesaid, hath been greatly obstructed and prevented from entering the said dwellinghouse through the said windows, and the said dwellinghouse thereby hath been greatly darkened; and other wrongs, &c.

For breaking and entering plaintiff's house, &c., consuming victuals, preventing cultivation of lands, &c.

For that the said D and E, on &c., with force and arms, broke and entered the dwellinghouse, three barns, two stables, one granary, and eighteen closes of the plaintiff, at &c. aforesaid, and continued in the said dwellinghouse against the will of the plaintiff, from thenceforth until the — day of &c., and during that time, did eat and consume the victuals and drink of the plaintiff there found, of the value of \$—, and lay in the beds of the plaintiff there; and afterwards, on &c., again broke and entered the said barns, stables, granaries and closes of the plaintiff, and locked up the doors of the said barns, stables and granaries, and the gates of the said closes, and kept and continued the same locked up, from thenceforth until the — day of &c. by reason whereof, the plaintiff, during that time, not only lost the use of the said barns, stables and granaries, but was hindered and prevented from the manuring, use and occupation of the said closes, and during all that time, could not plough and sow the same, in a due course of husbandry; and other wrongs, &c.

Quare clausum fregit, with continuando, &c.

For that the said D, on &c., with force and arms, broke and entered the closes of the plaintiff, to wit, one close, called *the yard*, and one other close called *the garden*, at &c., in &c., aforesaid, and then and there, with his feet in walking, trod down and damaged the grass there then growing; and with certain cattle, to wit, horses &c., trod down, ate up, and consumed other the grass of the plaintiff, there then growing, of the value of \$—; and did, then and there,

break, throw down, and spoil the fences of the plaintiff, standing on the said closes, and did, then and there, break up and dig the soil of the said closes; **CONTINUING** the said trespass, as to treading down and consuming the said grass in walking thereon, and eating up and treading down the said other grass with cattle, at divers days and times, from &c. until &c.; and other wrongs, &c.

Quare clausum fregit; for entering plaintiff's rooms, debauching his wife, and carrying her away.

For that the said D, on &c., at &c., with force and arms, broke and entered three apartments of the plaintiff, wherein the plaintiff and his family inhabited and resided, and part and parcel of a certain dwellinghouse, there situate, and then and there made a great noise and disturbance, in the said apartments, and staid therein for a long space of time, to wit, for the space of — hours, then next following, without the leave and against the will of the plaintiff, and, whilst he was in the said apartments of the plaintiff, to wit, on &c., at &c., with force and arms, made an assault on A, then and now being the wife of the plaintiff, *and then and there debauched and carnally knew the said A,* and then and there, by force, took and carried away the said wife of the plaintiff, from his said dwelling, to places, to the plaintiff unknown, and kept and detained the said wife of the plaintiff, from his said dwelling, for a long space of time, to wit, from thence hitherto, by means whereof, the plaintiff hath during all that time, lost and been deprived of the company and assistance of his said wife, in his domestic affairs, and his felicity therein hath been greatly interrupted and disturbed, to wit, at &c.; and other wrongs, &c.

NOTE. Where it is uncertain, whether the plaintiff can prove the *crim. con.*, a second count may be introduced, and the words in the above precedent, in italics, may be omitted.

Quare clausum fregit; taking away plaintiff's mare, &c.

For that the said D, on &c., with force and arms, broke and entered a certain close of the plaintiff, at &c., and then and there, with force and arms, took and carried away a certain mare of the plaintiff, there then being, of the value of \$—, *and kept and detained the said mare, and still keeps and detains the same; (or instead of the conclusion in italics,) and converted, and disposed thereof to his own use.*

NOTE. A second count may be added, omitting the breach of close.

Quare clausum fragit ; digging and carrying away peat, &c.

For that the said D and E, on &c., with force and arms, broke and entered the plaintiff's close, called *the peat lot*, situate in &c., and cut up, dug up, took, and carried away the soil, turves, and peat of the plaintiff, to wit, ten cart-loads of soil, ten cart-loads of turves, and ten cart-loads of peat, there then being of great value, to wit, of the value of \$—, and converted and disposed of the same to their own use ; and other wrongs, &c.

NOTE. Where a declaration in Trespass was for taking " goods, chattels, and effects," it was held that the plaintiff might recover for *fixtures*. 4 B. & A. 206.

REAL ACTIONS.

Writ of Right.

A Writ of Right is the highest of all Real Actions, and the last remedy for the recovery of lands and tenements. F. N. B. 1 A ; Comyn's Digest, Droit, B. 1. Like all other Real Actions, it must be brought in the county where the land lies, and against the tenant of the freehold, and not against a tenant for years, or other mere occupant in possession. *Ib.*

It is a concurrent remedy with other Real Actions of inferior degree and may be brought for the same lands, after an unsuccessful termination of any of them, by judgment on a verdict, or upon default of the demandant. *Ib.*

It may also be brought, when the length of time elapsed, is a bar to other real actions, by the statute of limitations. *Ib.*

But, after judgment upon a default or a nonsuit, after the mise joined in a Writ of Right, the demandant can never have another Writ of Right. F. N. B. 5 N. Before the mise joined, however, in a Writ of Right, if the demandant makes default, he may have a Writ of Right, *de novo*. Fitz. N. B. 5 N.

This action can be maintained by tenant in fee simple only ; for, tenant in fee tail, or tenant for life, cannot have it. F. N. B. 1 B.

But a tenant in fee simple conditional, it seems, may have this writ.

In order to recover in this action, it is necessary that the demandant, or the ancestor under whom he claims, should have been actually seized within the time limited by the statute of limitations.

In Massachusetts, before the Revised Statutes, if the demandant relied on his own seizin, he must have brought his action within thirty years after he was last seized ; if on the seizin of his ancestor, he must bring his action within forty years after such seizin, unless the demandant was within some of the exceptions of the statute of limitations,

What seizin is sufficient to maintain a Writ of Right.

Where A is tenant for life, remainder to B for life, remainder to the heirs of A, and A dies, and B enters and dies, and a stranger intrudes; the seizin which A had as tenant for life, is sufficient for A's heirs to maintain a Writ of Right. Vin. Abr. Droit de recto. C.

So where L and M are joint tenants, remainder to the heirs of L, and L dies, and a recovery is had against M; the heir of L shall have a Writ of Right for the whole on M's seizin, as well as on L's, because joint tenants are seized *per my et per tout*. *Ib*.

But where the demandant, in his count, claims by descent from a devisee under a will, he must allege and prove an actual seizin by taking of the esplees, in such devisee; for, a seizin by the devisor within the time of limitations, is not sufficient. See *Dally v. King*, 1 Hen. Bl. 1.

Of the count in a Writ of Right.

The count should allege an actual seizin, in fee and of right in the demandant, or in the ancestor under whom the demandant claims, within the time limited by the statute of limitations, by taking the esplees. 5 East, 272; 2 B. & P. 570.

Where the demandant relies on the seizin of the ancestor, he must, by tracing the descent of the title, show how he is heir. A mistake in any of the steps will be a fatal variance. 3 B. & P. 453; 1 N. R. 64, 233; 2 B. & P. 571; 2 East, 272. This is the more important, if the English rule is adopted, not to suffer a discontinuance of a Writ of Right. 2 New Rep. 429. Nor to allow of an amendment, except on very particular grounds. *Ib*.

Where, however, a verdict is flagrantly wrong, it seems a new trial may be had on a Writ of Right, but not otherwise. 2 Bl. R. 941.

It is not admitted in Writs of Right or Writs of Entry to have two counts for the same land.

If the same land is demanded in one count on the demandant's own seizin, and in another, on the seizin of an ancestor or predecessors, the writ may be abated by plea.

But in such case, under the Rev. Stat. ch. 100, sec. 21, the plaintiff may amend.

The plaintiffs, in any such case, may discontinue as to one of the counts. *Overseers of the Poor, &c. v. Otis*, 20 Pick. 38.

Who must join in a Writ of Right.

At common law, parceners and joint tenants must join in real actions; but tenants in common, having several titles, must sue severally.

In Massachusetts, by stat. 1785, ch. 68, "it is provided, that in actions of waste, ejectment, and other real actions, where possession of the inheritance, alleged to have descended, is the object of the suit, they ("heirs," in the statute,) "may all, or any two or more of them, join therein, or each one may prosecute for his particular share of such inheritance, and the same rule shall extend to joint tenants, who are or may be disseized."

To guard the young practitioner from mistake, it should be observed here, that, at the time when this statute was passed, the name "Ejectment," in the practice in this state, comprehended all real actions, as well Writs of Right, as others of an inferior degree, and the expressions in the statute, are to be understood, as if it had been said *that, in Writs of Right, &c., where the right is brought in question, "or other real actions," such as Writs of Entry, &c., "where possession," &c. &c.* If a different construction is given to these words, it will follow, that in Writs of Entry, the heirs may sever, but, in Writs of Right, must sue as at common law.

A question may naturally arise on this statute, which may be illustrated by the following case.

A devises land to D and E, and their heirs; (before the statute, they would have taken as joint tenants; since the statute they hold as tenants in common,) an abatement takes place, and it becomes necessary to commence a real action. In such case is it necessary, under this statute, that they should join; or, that they should sever; or is it optional to do either?

So far as these questions are concerned, the object of the statute undoubtedly was, from that time, to discourage the creation of joint-tenancies and to favor tenancies in common, and to give to joint-tenants and coparceners, the privilege of severing in suits, in the same manner as tenants in common. But there does not appear to be an intention of taking away from limitations, made in a particular manner, any choice as to the mode of prosecuting the remedy, which those, who are to take under such limitations, had before the statute. For before the statute, this limitation would have made D and E joint-tenants, and consequently they must have joined in suing any real action, which they might find it necessary to commence. Since the statute, they are tenants in common, and, as tenants in common may sue separately in real actions, unless the statute creates them tenants in common, *secundum quid*, i. e. so far as their tenure is concerned, and so far as to take away survivorship, but in no other respects. But, if the statute had permitted them to remain joint-tenants, they might have had the option of joining or severing at discretion, since that clause of it, which permits joint-tenants to sever in their actions. Now shall this statute, which in this respect was merely intended to give devisees the power of suing separately under a will, by making them tenants in common, deprive them of the power or right of joining in a suit, which they would have had before, as joint-tenants? If so, the statute in this respect has done more harm than good. Since it is better that two or more devisees, claiming land jointly under a single devise in a will, should be obliged to join in a real action, as joint-tenants, before the statute; than that they should be obliged to institute separate actions, as tenants in common, since the statute.

But perhaps it will be said, that the reason why tenants in common generally must sever in Real Actions, is because formerly they almost invariably claimed by several titles, as they still do now for the most part; but that there is no reason for the application of the rule, where they claim under the same title, and where they differ in no respects from joint-tenants, except that survivorship is taken away. As to this, *quare*.

From the above reasoning it would seem, that, where a devise of real estate is made to two or more, in such manner that they would have

been joint-tenants before the statute, they may join in a suit concerning their title, since the statute, or may sever at discretion.

Writs of right.

On demandant's own seisin.

Summon C D, of &c., yeoman &c., to answer to A B, of &c., gentleman, in a plea of land, wherein the said A B demands against the said C D one messuage with the appurtenances, situate in &c., as his right and inheritance; and thereupon he says, that he himself was seized of the demanded premises, in his demesne as of fee and right within thirty years last past, taking the esplees thereof to the yearly value of &c., whereof the said T deforceth him. See *Booth*, 94; *Rast.* 246, a; *Booth*, 109.

By husband and wife for the right of the wife on ancestor's seisin.

— To answer to A B, of &c., gentleman, and E, his wife, in a plea of land, wherein the said A B, and E, his wife, demand against the said D a parcel of land, situate in &c., as the right and inheritance of the said E; and thereupon the said A and B say, that one C C was seized of the demanded premises in his demesne as of fee and right, in a time of peace, within forty years last past, taking the esplees thereof to the value of &c.; and from the said C C, because he died without heirs of his body, the right &c. descended to one E E, as brother and heir of the said C; and from the said C the right &c. descended to one F F, as heir &c.; and from the said F the right &c. descended to one G G, as son and heir &c.; and from the said G the right &c. descended to one H H, as son and heir &c.; and from the said H the right &c. descended to one I I, as son and heir &c.; and from the said I the right &c. descended to the said B, the now demandant &c., and to one J J, the sister of said B, as the daughters and heirs &c.; and from the said J the right &c. of her purparty thereof descended to the said K K, son of K, as the son and heir of said J. who does not prosecute;* [and so the said A and B say, that the said demanded premises are the right and inheritance of said B, whereof the said D deforceth them.] See *Booth*, 104.

* There was a summons and severance.

On the seizin of an ancestor.

— And thereupon the said A A says, that one B A, the grandfather of the said A A, whose heir he is, was seized of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right, in a time of peace, within forty years last past, taking the esplees thereof to the value of \$—; and from the said B A the right of the tenements aforesaid, with the appurtenances, descended to one C A, as son and heir of said B, and from the said C, the right of the tenements aforesaid, with the appurtenances, descended to the said A A, the now demandant, as son and heir of the said C; [whereof the said D D deforceth him.] See *Booth*, 107.

By husband and wife, in her right, on their own seizin.

— And whereupon they say, that they themselves were seized of the tenements aforesaid, with the appurtenances in their demesne, as of fee and right, in right of her, the said A (*the wife*), in a time of peace, to wit, within thirty years last past, by taking the esplees thereof to the value of \$—, whereof the said D D deforceth them.

By husband and wife in her right on the seizin of her ancestor.

— And whereupon they say, that R C, deceased, whose heir she, the said A, (*the wife*) is, was seized of the tenements aforesaid with the appurtenances, in his demesne as of fee and right, in the time of peace, to wit, *within sixty years last past, (under the statute of this commonwealth "within forty years last past")*, by taking the esplees and profits thereof to the value of \$—, and from him, the said R C, because he died without issue, the right of the tenements aforesaid with the appurtenances, descended to E C, his brother and heir; and from the said E C, the right of the tenements aforesaid with the appurtenances, descended to M C, son and heir of the said C C; and from the said M C, the son, the right of the same tenements with the appurtenances, descended to the said A, daughter and heir of the said E C and wife of the said T D, who now demand the same, as the right and inheritance of the said A, and whereof the said D D deforceth them.

On seizin of demandant's father.

— And thereupon the demandant says, that E F, Esq., deceased, the late father of the demandant, was seized of

the said &c. with the appurtenances, in his demesne as of fee and right, in the time of peace, within sixty years (*under the statute of this commonwealth*, "forty years") now last past, by taking the esplees thereof to the value of \$—, and from the said E F the right descended to the said A B, who now demands the same, as son and heir of the said E F, and whereof the said D deforceth him.

On seizin of the demandant's father and mother, in right of the mother.

— And thereupon the demandant saith, that E F and G, his wife, father and mother of the said demandant, and who are both dead, were in their lifetimes seized of the tenements aforesaid, in their demesne as of fee and right, in right of the said G, in a time of peace, to wit, within sixty years (*under Mass. Stat.* "forty years") now last past, by taking the esplees thereof to the value of \$—, and from the said G, the right descended to the demandant, as son and heir of the said G, who now demands the same, and whereof the said D deforceth him.

NOTE. In 3d Chitty's Pleadings, 641, is a count by the heir of a devisee, in which the will, under which the devisee's title is derived, is recited in part, and in which the seizin, &c. of the deviser is set forth. But, *quare* of the necessity of this. For, if "the devisee was seized in his demesne as of fee and right," &c., it seems sufficient; without setting out his title in the count. For this there can be no more necessity, than there would be to show the seizin and title of the person under whom such deviser claimed. If the devisee's seizin is alleged, the title under which he held is to be shown in evidence, and the manner in which his title was derived can be of no consequence, provided only it is a good one. Suppose the demandant, in such case, counts that the ancestor (the devisee) was seized, &c., without showing the devisee's title, and then sets forth how he, the demandant, claims as his heir, what possible exception can be made to it, if it can be shown in evidence, that the devisee was seized in his demesne as of fee and right. If, however, the devisee never was seized, whatever his right may have been, it can never avail the demandant, since his title must be deduced from the person last actually seized. The practitioner is also cautioned against following the precedent in Wentworth's System of Pleading, 10th vol. p. 213.

Count by co-heirs entitled in different proportions.

In a plea of land, wherein the said N B, N B², M B and A W and E K, N L, M L, W L, A L, F L, and E L, demand against the said S and R W, a certain parcel of land, situate &c., which said parcel is bounded &c., as the right and inheritance of the said demandants; whereupon the demandants say, that one N W, sister to the said A W, and aunt to the said N B, N B², M B, E K,

N L, M L, W L, A L, F L and E L, was seized of the demanded premises, with the appurtenances in her demesne as of fee and right, in a time of peace, and within forty years last past, by taking the esplees thereof to the yearly value of \$—, and continued so seized until the said S W, and R his wife, thereafterwards, to wit, on &c., unjustly and without judgment of law, entered into the same demanded premises, and thereof disseized the said N W, who thereafterwards, on &c., died seized of the right in and to the demanded premises &c., from whom thereupon, for that she died without heir of her body begotten, the said right, as to one undivided fourth part of the demanded premises, descended to the said A W, as sister and one of the heirs of the said N W; and as to one other undivided fourth part descended to one N B (now deceased,) as brother and one of the heirs of the said N W; and from the said N the said right to the said undivided fourth part, descended to the said N B, N B, and M B, as children and heirs of the said N B, deceased; and as to one other undivided fourth part, the right of the demanded premises descended from the said N W to one N B, as mother and one of the heirs of the said N W; and from the said N B, the said right to one undivided fourth part, as to one third part of the said fourth part, descended to one B L, wife of the said W L, as daughter and one of the heirs of the said N B; and from the said B L the said right to one third part of said fourth part, descended to the said E K, N L, M L, W L, A L, F L, and E L, as children and heirs of the said B L, and from the said N B (deceased,) the said right to said undivided fourth part, as to one other third part of said fourth part, descended to the said A W, as daughter and one of the heirs of the said N B (deceased;) and, as to the remaining third part of the said undivided fourth part, the right of the said undivided fourth part descended to the said N B (first above named,) N B², and M B, as children of a deceased child of the said N B (deceased,) and co-heirs with the said B L (deceased,) and the said A W, of the said N B (deceased;) and from the said N W (deceased,) the right of the demanded premises, as to the remaining fourth part of the same, descended to the said B L (deceased,) as sister and one of the heirs of the said N W; and from the said B L the said right to the said fourth part of the demanded premises, descended to the said E K, N L, M L, W L, A L, F L, and E L,

as children and heirs of the said B L. And so the demandants say, that the right of the demanded premises hath descended to them, and they ought to have quiet possession thereof; yet the said S and R unjustly detain the same.

WRIT OF FORMEDON.

1. *In t'he descender.*

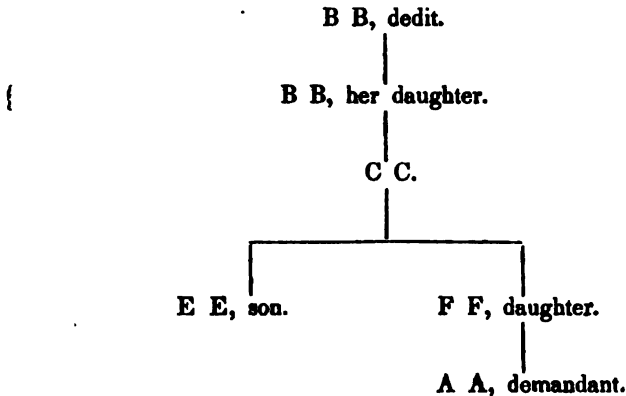
THIS writ lies for the issue in tail, in case of an alienation by the donee in tail, or in case of a disseizin done to him, to recover the lands given in tail. F. N. B. 486, L.

It is necessary to show in the count, that the person last seized was heir to the donee. 8 Co. 88, b. To say "son," is not sufficient. The demandant must mention every one in his pedigree, who was seized, or had a right descended to him, by force of the entail, and must always be made heir and cousin, or son and heir, to him who was last seized of the estate entailed. Dy. 216, a; 8 Co. 88, b. And the surest way is to make every man, who is named in the writ, son and heir, or brother and heir, in the writ, although perhaps he was never seized by force of the entail. Thus, if tenant in tail hath two sons and dieth, and a stranger abateth, and afterwards the elder dieth before entry, the younger shall have Formedon in the descender, and needeth not name his elder brother, heir to the father in the writ, but only son, because he never had seizin of the land, but only held the estate; but otherwise, if the elder brother had entered, for then he should be named son and heir to the father. F. N. B. 489.

In a writ of Formedon in the Descender, it is not necessary in any case to allege the taking of esplices in the donor. But they must always be alleged in him, who was seized under the gift in tail. F. N. B. 492, *in notis*.

In a Formedon in descender, if husband and wife were both seized in tail, the issue must demand as heir to both; if one was only in tail, the other for life, he must make himself heir to him in tail only. Comyn's Digest, Plead. (3 E 2.)

COUNTS IN FORMEDON IN THE DESCENDER.

Pedigree.

— To answer to A, in a plea of land, wherein the said A demands against the said D, one messuage and ten acres of land, with the appurtenances, situate &c. Whereupon the said A A says, that B B gave the said messuage and ten acres of land, with the appurtenances to B B her daughter, and the heirs of her body issuing, in form aforesaid; by virtue of which gift, the said B was seized of the messuage, and ten acres of land aforesaid, with the appurtenances, in her demesne as of fee and right, by the form of the gift aforesaid, in a time of peace, within — years &c., taking the esplees thereof, to the value of \$—; and from the said B, the daughter of said B, the right to the said messuage, &c., with the appurtenances, by the form of the said gift, descended to one C, as the son and heir of the said B, daughter of said B; and from the said C, the right &c., with the appurtenances, by the form &c., descended to one E, as the son and heir of the said C; and from the said E, the right &c. by the form &c., descended to the said A A, the demandant, as cousin and heir of the said E, to wit, as son of the said F, sister of the said E, son of the said C, son of the said B, daughter of the said B, &c., and which after the death of the said B B, daughter of the said B B, and of C, son and heir of said B, daughter of said B, and E, son and heir of said C, son of said B, and of F, sister of the said E, ought to *descend* to the said A A, son of the said F, and cousin and heir of the said E, by the form of the gift aforesaid. *Booth*, 142, 144; *Rast.* 365. *a. b.*; *Co. Ent.* 326.

NOTE. It appears by the writ that F was never seized, because she is named *sister* of E E, and not *sister and heir* of E E; and therefore the count must make the demandant heir to E, who was last seized, and the right descend from him, because he was the person who made the discontinuance or was disseized, or after whose death the abatement was made; for by the writ, it appears all were seized but F, for they are all named *son and heir*. Vide Booth, 144.

It is said in the count always, that the *right* "*descended*," though the ancestor died seized. The reason of this is, because it is not material whether the ancestors, after the first, were seized or not, so as a right did descend, and the demandant make himself heir to him who died last seized, or to whom the right did last descend.

In a Writ of Formedon, the demandant must always make himself heir to him who was last seized; as here, F, the mother, was never seized and therefore he makes himself heir to his mother's brother. F. N. B. 580; Booth, 143.

The ancestors that were seized, must be named in the writ, and named (*as son and heir*.) F. N. B. 528, as above in the count; but if any were not seized, such need not be named (*son and heir*) or (*sister and heir*;) as if the eldest son die before any entry, he need not be named son and heir; as here, F in this writ is not named heir. F. N. B. 529; 8 Co. 88, b. *Buckmen's case*, Booth, 143.

Such as were never seized, nor right descended to them, as if eldest son die before the father, without issue, need not be named at all. 8 Co. 1b.; 46 Edw. 3, 9; Booth, 143.

The clause "and which after the death, &c.," brings in the descent, but in this writ there is no clause "*eo quod, &c.*," but that is only proper in formedon, in Remainder or Reverter. Booth, 143.

But the ancestor, that never had any right descended to him, needs not be mentioned in the writ or count. As, suppose there be grandfather, father and son, and the grandfather aliens, and the father dies in the lifetime of the grandfather, and the son is to bring his Formedon; he may say thus, in his writ, "and which after the death of B B, the grandfather, son and heir of said C C, ought to descend to the said A A, the son, the son of E E, the son of B, the son of C, as the cousin and heir of the said B;" and not "which after the death of B B; the son of C C and of E E, the son of the said B, the son of C, ought to descend to the said A A, the son and heir of said E, the son of B, and heir of C." So in the count, the father may be left out thus, "and from the said C C, the right descended to the said B B, as son and heir; and from the said B, the right descended to the said A A, the now demandant, as cousin and heir of the said B; to wit, as son of E E, son of B B, son of C C." Booth, 145.

Since the statute of limitations, it is sometimes counted thus; "and from the said C C the right, &c. descended to the said B, which said B was seized of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in a time of peace, within twenty years now last past, taking the esplees thereof to the value, &c." Co. Ent. 325; Booth, 145.

A gave certain lands to B (wife of C,) and to the heirs of C, her late husband, on her body begotten. C had a son, D, and a daughter, E; and it was adjudged that B had but a *life estate*, and the fee tail rested in D; and that when he died without issue, E was tenant in tail, as heir, &c. *per formam doni*, and she brought Formedon, which is set forth in Co. Litt. 26, b.; Co. Ent. 254, and F. N. B. 213, E. 490. (MSS.)

Formedon in descender.

In a plea of land, wherein the said I demands against the said H and G [defendants] a certain tract of land &c. ; whereupon the plaintiff complains and says, that T B, on &c., at &c., being seized of the tenements, &c., in his demesne as of fee, made his last will and testament in writing, which was afterwards, on &c., duly proved, approved, and allowed ; and thereby devised the same to his three sons, A, B, and C, to hold one-third part thereof to each of them, and the heirs of his body ; so that if either of them should die without heirs of his body, his third part thereof should remain to the other two, and the heirs of their bodies ; so that if either of them two should die without heir of his body, his moiety thereof should remain to the other, and his heirs. And afterwards, at &c., on &c., the said T B died so seized thereof ; after whose death, his three sons aforesaid, by virtue of the devise aforesaid, entered into the tenements &c., and were seized of their respective third parts thereof, in their demesne, as of their inheritance and right, by form of the gift aforesaid, in a time of peace, in the year &c., each taking the profits of his respective third part thereof, to the yearly value of \$—. And after the death of the same C, for that he died without heir of his body, the said donees, A and B, were *jointly seized* of his said third part thereof, in their possession, as *of their freehold and right*, in a time of peace, in the year &c., taking the profits, &c. And after the death of the said A, the donee, and of D, his eldest son, the right of the said D, the donee, of his third part, descended to the demandant, as son and heir of A, the donee. And the said son B, the donee, held the whole of the said C's (the other donee,) third part, by the survivor. And after the death of the said donee, B, for that he died without heir of his body, the right of the said donees, B and C, *viz.* their two third parts, remained to the aforesaid I [demandant,] as son and heir of the said donee, A. And so the right of the whole tenements aforesaid &c. descended and remained to the demandant, who now demands the same, as son and heir to the said donee, A, by form of the gift aforesaid, &c.

Formedon in descender, some of the heirs being aliens.

In a plea of land, wherein the said S and T demanded against the said —, a certain tract of land &c., with the appurtenances &c., which they claim as the right and inher-

itance of the said S and T, in fee tail general; whereupon they complainand say, that S H, on &c., was seized of the tenements &c., with the appurtenances, in his demesne as of fee; and being so seized thereof, then and there made his last will and testament in writing, which since his death, hath been duly proved, approved, and allowed; and therein and thereby, among other things, gave and devised the tenements &c. to his nephew, I, viz. one half when he should arrive at the age of twenty-one years, he being then a minor, and the other half thereof, upon the death of S H and S, his wife, the said I's father and mother, to have and to hold the same to him, the said I, and the heirs of his body begotten, in fee tail general. And afterwards, on &c., the said testator died at &c., seized of the tenements &c. And afterwards, on &c., the said I, being then arrived at the age of twenty-one years, and said S H and S being then both dead, entered into, and became, and was actually seized of the tenements &c. in fee tail general. And afterwards, on &c., the said I, at &c., died, leaving O, P, Q, R, and a daughter, M, the wife of E, all subjects of the king of Great Britain, and aliens to the commonwealth of Massachusetts, and to all the United States of America, and incapable by law of inheriting or holding any lands, tenements or hereditaments within said commonwealth; and leaving, besides said four sons and one daughter, at said time of his decease, the said S and T [plaintiffs] his daughters, then, and ever since, and yet citizens of this commonwealth, and the only issue of his body lawfully begotten, besides four sons and one daughter, aliens as aforesaid; whereupon the right to the tenements &c. descended to the demandants, to have and to hold the same to them, in fee tail general; and they ought to be in the actual possession thereof; yet the said X [defendant] hath unjustly, and without judgment of law, entered thereinto and holds, &c.

2. *Formedon in Remainder.*

Where land is given to one in tail, remainder over; and the tenant in tail aliens in fee, and dies without issue; or the tenant in tail dies without issue of his body, and a stranger abates; he in the remainder shall have a writ of Formedon in Remainder. F. N. B. 499.

So, if lands are given to R for life, remainder to S in tail, and R dies, and a stranger abates and deforces S, S or his heirs may have a Formedon in Remainder. *Ibid.*

But, if he in the remainder, or his heir, is once seized of the lands by force of the remainder, he shall never have a Formedon in Remainder of that land. But the issue of such remainderman so seized, may have Formedon in the descender, or the tenant who has once been seized under the remainder, if put out, may have an assise of novel disseizin, or writ of *Quidus*. See F. N. B. 502.

Of the Count in Formedon in Remainder.

It is necessary in the count, to set forth all meane remainders; and to show that the donee died without issue. 8 Co. 88, a.

But it is not necessary to name the issues of the donee in tail; to say "because the donee died without issue," &c., is sufficient.

In a Formedon in Remainder, it is not necessary to allege the taking of esplees by the donor; it is sufficient if they are alleged in the donee. F. N. B. 492, n. c.

COUNT IN FORMEDON IN REMAINDER.

— Whereupon the said P P says, that the said A A gave the messuage &c., with the appurtenances, to the said B B, and the heirs from his body issuing, so that if the said B B died without heirs from his body issuing, the messuage aforesaid, with the appurtenances, should remain to the said P P and his heirs; by virtue of which gift the said A A was seized thereof in his demesne, as of fee and right, by the form of the gift aforesaid, in a time of peace &c., taking the esplees &c., and from the said B B, for that he died without heirs from his body issuing, the right by form &c. remained to the said B B, the demandant, and which [*after the death of the said B B, ought to remain to the said P P by the form of the gift aforesaid, for that the said B B died without heirs from his body issuing.] *Booth*, 152, 153.

NOTE. If the Formedon be brought by the heir of him in remainder, it is thus; "And from the said B B, for that he died without heir of his body issuing, the right remained to the said P P, and from the said P the right remained by form, &c. to the said Q, as son and heir, &c." *Rast.* 369, b.

If the Remainder be once executed, *viz.* if the remainderman be once seized of the estate tail in possession, and right descend to the heir, the heir shall never make mention of the remainder, but shall have the general writ of Formedon in descender; for it is a rule in the Register, that *brevia nunquam faciunt mentionem de remanere quando breve est in le descender*. As if A gives lands to B in tail, remainder to C in tail, and B dies without issue, C enters and aliens in fee, and has issue, D; D shall not have a Formedon in remainder, because C, his father, was seized, and the right descended to him, but he shall have a general writ of Formedon in descender, &c., "which A gave to C and his heirs of his body

*In the writ, but in the count it is by an "&c."

issuing, and which, after the death of said C, ought to descend to the said D, as son and heir of the said C." Reg. 244; 8 Co. 88, a, *Buckmer's case*; F. N. B. 546, b.; Booth, 152.

But a demandant in Formedon in Remainder ought to make mention of all the precedent remainders in tail. 8 Co. 88. But it seems, that all that were seized in the precedent remainders need not be named; viz. the issues of the remaindermen; and the remainderman who counts, need only say, "*eo quod*" the precedent remainderman died without issue. And the reason seems to be, because it is not requisite in a Formedon in reverter, for the remainderman's title depends upon the precedent remainderman's dying without issue, as his in reversion, upon the donee's dying without issue. Booth, 153, 154. (MSS.)

Formedon in Remainder by devise stating the title especially.

In a plea of land, wherein the said P demands against the said B the possession of one undivided fourth part of &c.; whereupon the said P complains and says, that his grandfather F, on &c., was seized in his demesne, as of fee, of the said &c., with the appurtenances, taking the profits &c.; and being so seized thereof, on the same day, duly made and executed his last will and testament in writing, and therein and thereby devised the same tract of land &c., to his son D, and the heirs of his body issuing. And in and by the same will, the said F devised, that if the said D should die without heirs of his body issuing, the same tract &c. should remain to the said F's four daughters, viz. S, A, R and M, to hold to them and their heirs, as tenants in common, and in equal parts, from and immediately after the death of the said D, without heirs of his body issuing. And thereafterwards, on &c., the said F died so seized. And thereafterwards, on the same day, the said D entered into the said tract &c., and by force of the said will, became seized thereof in his demesne, as of an estate in fee tail general, taking the profits, &c. And thereafterwards, on the same day, the same will was duly proved, approved, and allowed; by reason whereof, and by force of said will, the said S, A, R and M, then and there became seized, as of fee and right, of and in the remainder of the said tract &c., expectant upon the death of the said D, without heirs of his body issuing, and as tenants in common as aforesaid. And thereafterwards, on &c., the said D died so seized of his said estate, in fee tail general, and without heirs of his body issuing; whereupon the said tract &c. remained to the said S, A, R and M, by the form of the gift aforesaid, as aforesaid. And the said S became entitled and seized in her demesne, as of fee, of one undivided fourth part of the

said tract &c. And thereafterwards, on &c., the said S being so seized thereof, duly made and executed her last will and testament in writing, and therein and thereby devised the same undivided fourth part &c., to the plaintiff, his heirs and assigns. And thereafterwards, on &c., the said S died so seized. And thereafterwards, on the same day, the plaintiff entered into the same undivided fourth &c., and became seized thereof in his demesne, as of fee; and there on the same day, the said will of the said S was duly proved, approved, and allowed; and the plaintiff ought now to be in quiet possession and seizin of the demanded premises; yet the said B hath illegally entered into the same, and continues to keep the plaintiff out, &c.

DANA.

3. *Formedon in the Reverter.*

Where there is a gift in tail, and afterwards by the death of the donee, or his heirs, without issue of his body, the reversion falls in upon the donor or his heirs, a writ of Formedon in the Reverter lies, for such reversioner. F. N. B. 503; 8 Co. 88.

So if, after the gift in tail, the donor or reversioner makes an assignment, and afterwards the estate tail determines, for want of issue in tail of the donee, the assignee of the reversion may have a Formedon in Reverter. *Ibid.* But if the reversion is assigned in tail, and not in fee, such reversioner may have a special writ, the form of which is given in F. N. B. 503, a count on which may readily be framed.

The time limited by statute, within which writs of Formedon in Descender, in Remainder, and Reverter, must be brought.

It is generally thought, that a clear adverse possession of land, for the term of limitation of a writ of right on the seizin of an ancestor, will make a clear title against all the world; but this is denied by Sugden in his treatise on the law of Vendors and Purchasers. He says, it is possible that an estate may be enjoyed adversely for hundreds of years, and may at last be recovered by a remainderman. He puts the case of an estate tail, with remainder over in fee, and supposes the tenant in tail to be barred of his remedy by the statute of limitations, and then remarks, "it is evident that as his *estate* subsists, the remainderman's right of entry cannot take place, until the failure of issue of the tenant in tail," &c. See also, 3 Cruise's Digest, 541; Ballantine on Limitations, 10; Lutw. 770; Brown's Parliamentary Cases, 67; Salk. 422.

All actions of Formedon, whether in Descender, Remainder or Reverter, under the Massachusetts Statute, 1786, chapter 13, section 4, must be brought within twenty years after the title or cause of action first descended, &c. There is, however, a proviso in the same section, that a person, under age, a feme covert, *non compos*, imprisoned, or beyond seas, or without the limits of the United States, at the time when the

title first descends, may bring such action within ten years after the expiration of the twenty years. By the Statute, 21 Jac. 1, chapter 16, persons laboring under similar disabilities, must bring their suits within ten years after the removal of the disabilities. Note the diversity.

Where the statute of limitations once begins to run, it never stops on account of any subsequent event; and, therefore, if after an estate tail has determined, the remainderman or reversioner, suffers ten years of the twenty to elapse without bringing his suit, his heir, whether laboring under a disability or not, will have no more than the remaining ten years of the twenty, to bring an action. 6 Massachusetts Reports, 328.

P P demands against D D one messuage &c., whereupon he says, that R R, the grandfather of said P R, &c.* was seized of the (tenements aforesaid,) with the appurtenances, in his demesne, as of fee and right, in a time of peace &c., taking &c.; and being so thereof seized, afterwards gave the tenements aforesaid, with the appurtenances, to the said C C, and the heirs of his body issuing, in form aforesaid, by virtue of which gift the said C was seized thereof in his demesne, as of fee and right, by the form of the said gift, in a time &c., taking &c.; and from the said C C, for that he died without heir of his body issuing, the right by the form &c. remained to the said W W and the heirs of his body issuing; and from the said W W, for that he died without heir of his body issuing, the right by the form &c. reverted to the said P P, the now demandant, as cousin and heir of said R R, to wit, son of B B, son of said R R, and which after the death, &c. *Booth, 156; Rast. 375, a.*

NOTE. This count is for the grandchild of the donor, where a gift is made in tail, remainder in tail, and both die without issue.

By this count, the father never had any right descended to him, because the demandant makes himself heir to the grandfather. *Booth, 156.*

It is a rule in Formedon in Reverter, that the esplees must be alleged both in the donor and donee, as in the above count. F. N. B. 549; *Booth, 156.*

In this writ none of the ancestors of the donor, that were seized of the reversion, or to whom a right to the reversion descended, are to be omitted in the pedigree; and, therefore, the omission of the eldest son who survived the father shall abate the writ; as, if there be grandfather, father and son, and the grandfather gives land to R in tail and dies, and then the father dies, and then R, donee in tail, dies without issue, and a stranger abates, the son, in a formedon in reverter, must say, "and which, after the death of R, to the said C, son and heir of L, son and heir of M, the grandfather, ought to revert by the form, &c., for that the said R died without heirs of his body issuing." 8 Co. 88, *Buckmer's case; Booth, 155.*

But on the part of the donee, the demandant need not name any of the issues in tail in the pedigree, either in the writ or count, but shall say,

* Whose heir he is, in the writ.

"and which, after the death of said R (the donee,) ought to revert to him, for that the said R (the donee,) died without heir," &c. 8 Co. 88. And otherwise the count will be bad. Booth, 155. (MSS.)

WRIT OF ENTRY.

It may not be amiss, before considering Writs of Entry, to make a few observations relating to the right of entry, as also in relation to seizin, disseizin, &c.

1. *Right of Entry.*

The right of entry is the right which a man has of entering into lands in the possession of another, and reducing them into his own possession. It may be laid down as a foundation, that wherever a man has a right to the immediate possession of land, he may lawfully enter and occupy it, and so perfect his title. As a general rule, where the commencement of an adverse possession is tortious; as, after an abatement, an intrusion, or a disseizin, the person having title may enter. Co. Lit. 15. So a man may enter on his tenant by sufferance. Co. Lit. 57.

Upon the ceasing of a particular estate, he in the reversion or remainder may enter on the person in possession. So for a condition broken. If husband aliens his wife's lands in fee, after his death, she or her heir may enter immediately, according to the common law of the state, which, according to the prevailing opinion in this respect, has adopted the provision of the Stat. 32, H. 8, ch. 26.

In all cases where the party's right of entry is not taken away, it may be recommended to make a formal entry, and afterwards either commence an action on the demandant's own seizin, or perhaps resort to the process given by the Stat. 1825, ch. 89, or in particular cases, to the process of forcible entry and detainer.

Where the party may not enter, but must resort to an action.

A widow cannot enter, but must have her dower assigned, either by the heir or by process of law.

Where A enters on B's land, either as an abator, disseizor, or intruder, claiming title, and keeps possession for twenty years, B's entry is taken away by the statute of limitations. Co. Lit. 237, b.

In like manner, if A keeps such adverse possession five years, and dies, and his heir enters, B cannot lawfully enter, but must resort to his action. Stat. 32, H. 8, ch. 33.

In cases of discontinuance or forfeiture, the entry is generally taken away. As where tenant in tail enfeoffs in fee, his issue, or he in the reversion, or remainder, cannot enter but must bring Formedon. Lit. § 595. This, however, is altered by the statutes of this state.

So at common law; though under 32 H. 8, ch. 26, it is otherwise, if husband seized in right of his wife, aliened in fee, tail, or for life of another, the wife could not enter after the death of the husband. Lit. §

594. But in both cases the alienation must be made by feoffment, or some conveyance equally effectual; for, a devise or a conveyance that lies in grant, or that operates without livery, will not work a discontinuance. Com. Dig. Discontinuance, (C 3.) (C 4.)

A descent will not take away an entry, if the person having title, was under a disability at the time of the descent cast, as a feme covert, an infant, a person of non sane memory. Com. Dig. Descent, (D 7.) (D 8.) (D 9.)

Where a party has a right, for which he can have no remedy by action, it seems his entry is not taken away; as where a feoffment is made upon condition, and the condition is broken, and afterwards the feoffee dies seized, and a descent is cast, the feoffor may enter for breach of the condition. And generally, a descent does not take away a title of entry. Com. Dig. Descent, D 10.

A dying seized of an estate in remainder or reversion, will not take away an entry; as if A disseizes B and leases to C for life, and dies seized, B's entry is not taken away. Co. Lit. 239, b.

If a disseizor, abator, or intruder, enfeoffs his father, and the father dies, so that the lands descend to the disseizor, abator, &c., the disseizee's entry is not taken away. Vin. Abr. (A 12.)

Where tenant for life has a right to enter, but will not, it is said, he in the reversion or remainder cannot. *Quære.* See Vin. Abr. (A 2, 2.) (A 3, 6.)

2. Of Seizin, Disseizin, &c.

There are two kinds of seizin; a seizin in deed, and a seizin in law. A seizin in deed, is the possession of lands claiming a freehold or inheritance. The mere possession of lands is not a seizin; for, a lessee for years has the possession of the lands leased, but he has not the seizin; the lessor has the seizin. In this case the possession is in one and the seizin is in another; yet this is an actual seizin, for, the possession of the lessee for this purpose, is considered as the possession of the lessor. There are therefore two kinds of seizin in deed. One, where the possession and claim of title are in the same person; the other, where the person in possession admits that the title is in another person, under whom he holds. This person is as much seized, as if he were the actual occupant of the lands himself. Both these seizins are seizins in deed. Where a man is in the actual possession or occupation of land himself, claiming a freehold, there can be no doubt whether he is actually seized or not; but where another is in the possession, there often may arise doubts, what will be such an adequate acknowledgment, express or implied, on the part of such occupant, as will amount to a seizin of the person claiming title.

A receipt of rents or profits gives an actual seizin. An entry of part in the name of the whole gives an actual seizin. Com. Dig. Seizin, (A 2;) 3 Wils. 516.

A seizin in law seems to be where a man has a right of entry into lands, and the possession of them is vacant. In such case the law presumes him to be seized, though he has never entered. Thus, if an ancestor dies seized and the heir neglects to enter, or to do any act equivalent, yet the law will presume him to be seized; and this presumption will continue until some act is done adversely.

If a stranger abates immediately after the death of the ancestor, yet

the law will throw a seizin in law upon the heir, by dividing an instant, and the wife of the heir, if he should afterwards die without obtaining a seizin in deed, shall be endowed of this seizin in law. Plowd. 258; Watk. on Des. 50.

But if the heir once enters, he will be considered in actual seizin of the land, although he should immediately afterwards leave the occupation of the land vacant. And this actual seizin in such case will continue, until some other person shall enter and make an *adverse claim*; for a simple entry without making claim of title, will not destroy the seizin of the heir, but will be merely a trespass or a disseizin, at the election of such heir.

And where there is a concurrent occupation of lands, the law will adjudge him to be seized, as well as possessed of the lands, who has the title; because the law favors the claim of him who has right. See 3 Mass. R. 215.

Thus, if A is the owner of lands and in possession of them, and B enters, and they occupy together, the possession is A's, as well as the seizin; and this, although B should claim title adversely to A. If, however, B should fence off part of the land and occupy it exclusively, this would destroy A's seizin and possession, but then the possession would cease to be concurrent. For B, by his possession, claiming title, would gain a seizin, and A would lose his, because, though there may be a concurrent possession of lands, there cannot be a concurrent seizin. And even in the case last put, the fencing off, and the claiming title to the lands, will not amount necessarily to a disseizin, for A, any time within the statute of limitations, may consider these acts as mere trespasses, and seek for a remedy accordingly. But if A suffers B to fence him off in this manner, and B dies after five years' exclusive occupation, it is no longer in A's power to treat these acts as mere trespasses; he cannot enter on B's heir, but must have recourse to an action. For it is no longer at his election to consider himself as not disseized. The law is the same if he suffers B to remain in such exclusive possession, without entry or claim, for twenty years. But within the five years in the former case, and the twenty years in the latter case, it is at the election of the person dispossessed, for many purposes at least, whether he will consider himself as disseized or not. Thus, he may, within the twenty years, bring an action of ejectment, which he could not do, if it amounted to an absolute disseizin, and may recover for mesne profits, which he could not do if actually disseized. 1 Bur. 111.

There are therefore two kinds of disseizin. One consists of an actual ouster, such as that just described or equivalent to it; the other, without ouster, and which could not be considered as a disseizin, unless the party chose to consider it so for the purpose of availing himself of a more convenient remedy, than he otherwise would have had. This latter species of disseizin is more often seen in incorporeal hereditaments, &c., of which it is impossible for a man to be *actually* disseized.

Disseizins at first, it is conjectured, happened in this way. A stranger having entered on one of the tenants of a manor, and expelled him from his freehold, at the proper time, offered himself to the lord of the manor, and tendered him his rent or corporal services. The lord, being wholly indifferent to the person of the tenant, and interested only in receiving these rents or services, without any inquiry into the manner

in which the change of tenants took place, acquiesced, and left the parties to their remedy at law. This, however, is merely matter of curious inquiry. The following cases will serve to illustrate the law of disseizins in relation to corporeal hereditaments. If a man enters into lands or tenements where his entry is not lawful, and ousts another of his freehold, by keeping possession, and claiming to do so under title, this is a disseizin, and if the person ousted does not re-enter within the time limited by the statute, he will have no remedy for the recovery of his land, except by bringing a real action. The law is the same, if he enters upon the possession of a lessee. This is a disseizin of the lessor if he retains the possession or claims adversely. But in either case, if he enters without claiming title, it is a mere trespass. So, if a man enters by sufferance of the owner, it is no disseizin. See *Kennebec Purchase v. Springer*, 4 Massachusetts Reports, 416. See also, 6 Massachusetts Reports, 229.

If one parcener enters, claiming the whole estate, and takes the profits of the whole, it will be a disseizin of the coparcener. But where both are in possession together, one cannot disseize the other without an actual ouster. And merely taking the profits is not sufficient to make a disseizin in any case. *Ld. Raym.* 829.

If B enters on the possession of A, but does not expel him, it is not a disseizin, for the law will adjudge him to be seized, who has the right; and no act will amount to a disseizin, however tortious, that does not oust him who has the freehold. See *Littleton*, § 279; 1 *Salkeld*, 246.

If a lessee continues in possession after his term, without other act, it is no disseizin; he is merely tenant by sufferance; for a wrongful continuance after a rightful entry, is not a disseizin. 3 *M. & S.* 371.

Where a man enters on land, claiming as guardian, when he is not so, the act here may be considered as a disseizin, the pretence being false; or, if a man should enter on the land of an infant as a trespasser, or under any false pretence, yet the heir may call him to account as guardian, thus electing not to be disseized, but claiming title and waiving the tort or disseizin at the same time.

Again, where a man enters upon land of an infant, claiming to enter by permission, or otherwise, under and acknowledging the infant's title, this in strictness is no disseizin, because of the acknowledgment that the seizin is in the infant, and his entry and possession is under and consistent with the infant's seizin; yet as the infant's consent, for want of discretion, is void in the eye of the law, and as acknowledgment of the infant's title, will not excuse the entry without consent, it amounts to a *disseizin at election*. It seems, therefore, that there are hardly any acts that amount to a disseizin, if the party, within the time of limitation, elects to consider himself as *not disseized*, by pursuing his remedy as for a mere trespass. But there are a great many acts, that will be matured by lapse of time into disseizins, so as to take away the right of entry, if the party through negligence suffers such time to elapse without entry or claim. And there are also some acts which the party may elect to consider as disseizins, but which will hardly be subjects for the operation of the statutes of limitations in this respect.

If a man dies seized, his heir has a seizin in law before entry; and after entry, a seizin deed. This entry may be by the heir himself, or by some other person to his use. And where it is made by another.

person, there are two cases; where the heir is an infant; and where he is of full age. Where the heir is an infant, the entry of a guardian is sufficient; and a mere stranger, who enters and takes the profits, shall be considered both at law and in equity, as a guardian. And the entry of such person, shall even make a *possessio fructus*, where a stricter seizin is requisite, than to maintain a Writ of Right. And therefore, where A died seized, leaving two infant daughters, by different venters, it was holden, that an entry *generally* (i. e. without making any particular claim,) by the mother of the youngest daughter, as her guardian in socage, constituted a sufficient seizin in the eldest infant daughter, to carry the descent of her moiety on her death, to her heirs. *Goodtitle v. Newman*, 3 Wilson, 516. This case is far stronger than any one in this commonwealth, on account of the difference in the law with respect to the half-blood. 7 T. R. 386.

If the heir is of age, the entry of a person properly authorized will give an actual seizin to the heir. And indeed it seems generally, that if a person enter in the name of him who has right, even though it be without precedent command, or subsequent assent, and whether he who has the right, be an infant, or of full age, it shall vest the freehold in him who has such right. Because the person entering gains possession, and the seizin is governed by the possession when the possession *precedes* it, unless the entry is made and possession taken, with a view to a seizin in some other person; but here the person entering gains no seizin to himself, because he enters claiming for another, and though, as respects the person on whom he enters, he may be considered as a disseisor, yet as respects the heir, he can only be a disseisor *at his election*. But if the heir should expressly dissent, no seizin would be gained for the heir. Or, if it were for the disadvantage of the heir, no consent would be presumed, for the law only presumes the consent of the person having title, where it is for his advantage.

And therefore in England, it has been settled, if a man dies leaving a son and daughter by one venter, and a younger son by another, the entry of such younger son will give an actual seizin to the eldest, and if the oldest son dies afterwards, the sister shall inherit, and exclude the younger son, who entered. This, however, is where the younger son enters *generally*, without claiming to himself. And the reason is, that his entry and possession not being adverse, the legal seizin of the elder brother, shall draw to it the possession of the younger, and so give the elder an actual seizin. So the entry of one coparcener, joint-tenant, or tenant in common, is sufficient to give an actual seizin to those who do not enter, so as to exclude the half-blood in England, and *a fortiori* to maintain a Writ of Right. See 10 Massachusetts Reports, 494; 1 Massachusetts Reports, 434. Where the heir exercises any public act of dominion over the inheritance, it seems equivalent to an actual entry.

Where seizin of an inheritance is once proved, it is presumed to continue, till the contrary is shown. This is recognized for law, here as well as in England. *Kennebec Purchase v. Springer*, 4 Massachusetts Reports, 416.

With regard to cases where a man claims by purchase, if the transfer is by a conveyance at common law, it is usually made by such a conveyance, or in such a manner, as to give the purchaser an actual seizin. But with regard to those persons who claim under wills, it may be observed, that on the death of the deviser, dying seized, the same

strictness is not required, with regard to seizin in the devisee (though a special heir,) in order to enable *his* heirs to claim under him as ancestor, that is necessary where a man dies seized, and leaves an heir. For if R dies seized, leaving S his heir, who makes no entry, and does nothing tantamount, those who claim the land must make themselves heirs to R, as the person last actually seized. But if R makes a devise to S, and dies, and S does not enter, yet S's heirs *may enter*, and then they shall claim as heirs of the devisee, and not as heirs of the devisor. In the case of *Wells v. Prince*, 4 Massachusetts Reports, 67, the law with regard to devises is plainly laid down by Chief Justice Parsons. 1. *On the death of a devisor, dying seized in general, a devisee is not seized without entry. 2. But if the lands are vacant and unoccupied, no entry is necessary, because there is no one to enter upon. 3. If a stranger is in possession, acknowledging the devisee's title, it is equivalent to an entry. To this it may be added, that the possession of a lessee for years of a devisor or ancestor, will be sufficient to give an *actual seizin* to the devisee or heir, without entry, and even if the devisee or heir should die before rent becomes due. Watkins on Descents, 65; *DeGray v. Richardson*, 3 Atk. 469.

A few remarks also may not be amiss with regard to the subject of abatement. Abatement into land, is when a man dies seized, and another, who has no right, enters before the heir or devisee. The effect of this abatement is to prevent the seizin, or in other words, to rebut the legal presumption of seizin, in the heir. But, in order to have this effect, it is necessary, that the entry should be made, claiming adversely to the heir or devisee, and with an intention to abate. Because if such entry were made under the title of the heir, whether with his authority or without, it could not be an abatement, but *at his election*. And it has been shown before, that unless such entry were injurious to him, or he expressly dissents to it, the law presuming his assent to what is for his interest, would give him an actual seizin. But if a person entered *generally*, and took the profits, the law would give the election to the heir, either to consider him as a bailiff, and recover the profits in an action of account, or as a tenant at will, and recover for use and occupation; or, after, and perhaps without an entry on the land, to consider him as a trespasser, and recover accordingly in Trespass with a *continuando*. One of these, however, in prudence he should do, before the statute of limitations could possibly mature the trespass into a disseizin. Such entry *generally*, can hardly amount to an abatement, except *at election*, because the law will hardly intend, that he committed a greater injury than is necessarily contained in the acts which he has done. Now the injuries done by his bare entry without claim, extend no farther than to the possession, and are perfectly compatible with seizin in the heir. Such act, therefore, is not, by construction, to be made an abatement of the freehold, except at the election of the heir. But if a stranger should enter before the heir, claiming adversely, this is plainly an abatement, because wholly inconsistent with any seizin in him.

So if R is seized of lands in the occupation of S, and devises to T, and after R's death, S continues in possession, this obviously does not amount to an abatement, without some express denial of T's right or some equivalent act.

* *Actual seizin*, it is supposed, is here intended.

A WRIT OF ENTRY.

A Writ of Entry is a real action, and is a general remedy for the recovery of the possession of lands, &c., whenever wrongfully withheld. Its extensive nature, as a remedy, will be best illustrated by a recital of a few of the cases of most frequent occurrence.

1. D is disseized by E; after entry to regain possession, D may maintain Trespass; or, without entry, may bring a Writ of Entry, on a disseizin done to himself. F. N. B. 442.

2. D is disseized by E, and dies. D's heir, F, shall have a Writ of Entry, on a disseizin done to his ancestor D. This is called a Writ of Entry in *de quibus*. *Ib*.

3. D is disseized by E, who demises to F. D shall have a Writ of Entry in the *per* against F, on a disseizin done to himself. *Ib*.

4. D is disseized by E, who demises to F; D dies. D's heir, G, shall have a Writ of Entry in the *per* against F, on a disseizin done to D. *Ibid*.

5. D is disseized by E, who demises to F, who demises to G. D shall have a Writ of Entry in the *per* and *cui* against G, on the disseizin done to himself. *Ib*.

6. D is disseized by E, who demises to F, who demises to G, who demises to H. D shall have a Writ of Entry in the *post* against H, on the disseizin done to himself. *Ib*.

7. D is disseized by E, who is disseized by F. D shall have a Writ of Entry in the *post* against F. F. N. B. 444, F.

8. D is tenant for life, or tenant by the curtesy, or tenant in dower, and dies; and E enters before the reversioner F. F shall have a Writ of Entry for the intrusion, counting on the seizin of the ancestor, husband, &c. according to the fact. F. N. B. 468. This writ is also in the *per*, *per* and *cui*, and *post*, like the preceding, and every descent or alienation, from or by the intruder, as in the case of disseizins, makes one degree, and after the degrees, any further descent or alienation puts the writ in the *post*. *Ib*. It should also be observed, that a disseizin, intrusion, abatement, &c., after a preceding disseizin, intrusion, &c. puts the writ out of the degrees.

D is tenant in fee simple or fee tail, and dies seized, before the entry of E, the heir, or issue in tail; a stranger, F, takes possession; for this abatement, a Writ of Entry lies on D's seizin, which may be brought in any of the degrees according to the facts of the case, or in the *post*. But it is recommended rather to make an entry, and then, if de-forded, to bring a Writ of Entry on E's seizin. So if D devises lands to E, and dies, and any other than the devisee takes possession and excludes him, a Writ of Entry for this abatement may also be maintained, and the seizin of the devisor must be the foundation of it. *Sed Quare*. For, it is said a devisee is seized without entry, though he cannot maintain Trespass until after entry made.

A Writ of Entry also may be maintained, where an infant or a person *non compos*, conveys land against the grantee, and either by the infant himself or his heir, as also by the person *non compos*, himself (though this has been denied,) or his heir, to recover the land back; making the count conformable to the facts in the case, and either stating the infancy, &c. in the count, or counting generally on a disseizin, &c., done to the infant, &c., and giving the infancy, coverture, &c. in

evidence, to rebut the tenant's title, under the deed upon which he relies. The remarks with respect to the degrees, likewise apply here. F. N. B. 466.

A Writ of Entry also lies, where a lessee for life or years, or a stranger, after the expiration of the term, either by surrender or efflux of time, enters upon the lands and deforces the lessor. And the writ may be brought by the lessor himself, or his heirs, or by a grantee of the reversion, counting according to the fact, and in case of any descents or alienations, bringing the writ in the proper degree or in the *post* accordingly. F. N. B. 464. The writ is then called a Writ of Entry *ad terminum qui præterit*.

So where the husband aliens the wife's land, which she held as tenant in fee simple, fee tail, or for life; if they are divorced, she may afterwards bring a Writ of Entry against the alienee, whether he holds as tenant in fee simple, fee tail, or for life, counting in the proper degree, or in the *post*. This Writ of Entry is named a writ of *cui ante divortium*. And the heir of the wife, if she dies before action brought, shall have a similar Writ of Entry, called a *sur cui ante divortium*, if she was tenant in fee simple; but if the wife was tenant in tail, the heir must bring a Formedon in the Descender. Fitz. N. B. 470.

In England, in former times, when feoffments were made by livery of seizin without deed, a Writ of Entry might also be maintained by a woman, who had given lands to a man, to the intent that he should marry her, to recover the land back, if he did not; but, in this country for the woman to maintain a Writ of Entry in such case, it would be necessary that such intent should be expressed in the deed of conveyance, otherwise she would be hardly able to recover. Such writ was called a writ *causa matrimonii prælocuti*. But here the woman might enter for the condition broken, and afterwards maintain Trespass; or she might bring a Writ of Entry, counting on the disseizin as done to herself, if the man held possession adversely after such entry.

If tenant in dower aliens in fee, for life, or in tail, the reversioner or his heir, or any grantee of the reversion, may maintain a Writ of Entry against the alienee, or his feoffee, or heir, &c. immediately, counting in the proper degree, or in the *post*, such alienation by tenant in dower being a forfeiture. This is called a Writ of Entry *in casu proviso*. F. N. B. 473.

The law is the same in case of an alienation by tenant by the curtesy, or by tenant for life, or by tenant for the life of another, but the writ is called a Writ of Entry *in consimili casu*. F. N. B. 474. But it should be remarked here, that though the deed of alienation from tenant for life, &c. to the alienee, may contain words of inheritance, it will not occasion a forfeiture, unless the conveyance operates as a feoffment, fine, or common recovery; for, if the operation is merely that of a bargain and sale, which conveys no more than lawfully may pass, there will be no forfeiture of the life estate, and consequently no such writ can be brought. It should be observed further, that in cases where this writ may be brought, of whatever nature the limitation of the tortious conveyance may in fact be, whether in fee, in tail, or for the life of the alienee, or any other, except that of the alienor, the writ always supposes the alienation to be in fee. F. N. B. 474.

If, in cases of alienation similar to those just alluded to, the re-

versioner, or his heir, or grantee, whether claiming as tenant in fee, or for life merely, do not bring the writ just mentioned in the lifetime of the tenant for life, he may have a Writ of Entry after the death of the tenant for life. This is called a Writ of Entry *ad communem legem*, and may be in the *per*, *per* and *curi*, and *post*. F. N. B. 477.

On disseizins. — On demandant's seizin.

—— to answer to P P of &c., in a plea of land, where- in the said P P demands against D one messuage in N, whereof the said D unjustly, and without judgment, disseized the said P P, within thirty years now last past; and thereupon he says, that he was seized of the messuage aforesaid, with the appurtenances, in his demesne as of fee and right, in a time of peace, taking the esplees thereof to the value of &c., and thereof the said D unjustly and without judgment, disseized him, the said P P &c., within *thirty years* last past, &c. *Plowd.* 353; *Booth*, 176.

On seizin of demandant's ancestor.

—— Whereupon he says, that A A, the father of said P, whose heir he is, within thirty years last past, was seized of the messuages aforesaid with the appurtenances in his demesne, as of fee, in a time of peace, taking the esplees thereof to the value of &c.; and from the said A, the right &c. was descended to the said P, the demandant, as son and heir of the said A; and whereof the said D, unjustly and without judgment disseized the said P P within thirty years now last past, &c. *Rast.* 279, b. 280; *Booth*, 177.

NOTE. It is not said, "which he claims as his right and inheritance," in the writ of *disseizin*, or in the count, when it is brought of the demandant's seizin, and against the disseisor immediately. Vid. Reg. 229; *Rast.* 276, b. But see F. N. B. 474, that it ought to be *quod juris clamat*, &c., in this writ, as well as in that on the ancestor's seizin.

This Writ of Entry on disseizin is in nature of an assize, and may be brought by tenant in tail, or tenant for life; and the count for tenant for life shall say, "that he was seized of the messuage aforesaid in his demesne, as of freehold," &c.; and so may a tenant in tail, without setting forth how the estate tail began; or, he may show the gift specially in his count, as it is done in *Rast.* 277, 278. See F. N. B. 475; *Dyer*, 101; *Co. Ent.* 219, b. See *Co. Ent.* 219, for Entry in the post and count. (MSS.)

Entry ad terminum qui preterit, cum titulo, in the Per.

— Wherein the said B demands a certain messuage &c., as of his right and inheritance, into which the said A [defendant] hath not entry, but by E, father of the said B [plaintiff,] whose heir he is, who demised it to the said A for a term of years that is past; and saith, that the said E was seized of the aforesaid &c., in his own right, as of inheritance and right, in a time of peace, within thirty years last past, taking the profits thereof to the yearly value of \$—; and being so seized thereof, demised the same to the said A for a certain term, which is past; after which, they ought to return to the said B, son and heir of the said E, from whom the right descended to him; but the said A still unjustly withholds the same from him &c.

READ.

Same in the Per and Cui.

— into which the said A hath not entry, but by C, to whom E, father of the said B, whose heir he is, demised it for a term that is past; and saith &c. [as before]; but the said A hath entered into the land &c., by the said C, and still unjustly withholds the same from him.

READ.

Entry ad terminum qui preterit, in the Per and Cui.

— into which the said A hath not entry, but by C, to whom the said B [plaintiff] demised it for a term that is past; and saith that he, the said B, was seized &c. [as before]; after which they ought to return to the said B again; but the said A entered into the said lands &c., by the same C, and still unjustly withholds the same from him.

READ.

Same in the Post.

— into which the said L hath not entry, but after the demise which the said M [plaintiff] thereof made to N, for a term which is past; and saith, that he, the said M, was seized, &c.

READ.

Entry sur disseizin.

— wherein the said M demands &c., whereof the said L unjustly disseized him; and saith, that he was seized &c. in his own right, as of freehold, [as the case may be] in a time of peace, within thirty years last past, taking the profits &c.; and the said L afterwards unjustly disseized him, and still withholds, &c.

READ.

Same, in the Per.

—into which the said L hath not entry, but by T, who demised the same to him, thereof unjustly disseized the said B [plaintiff;] and saith that he was seized &c.; and the said T thereof unjustly disseized him, and demised the same to the said L, who still unjustly withholds, &c.

READ.

Same, in the Per and Cui.

—into which the said A [defendant] hath not entry, but by D, to whom E demised the same, who thereof unjustly disseized the said F [plaintiff;] and saith &c.; and the said E thereof unjustly disseized the plaintiff, and demised the same to the said D, by whom the said A entered and still withholds, &c.

READ.

Same, in the Post.

—into which the said E hath not entry, but after the disseizin, which G thereof unjustly did to the said F [plaintiff;] and saith &c.; and the said G thereof unjustly disseized him. And afterwards the said E thereinto entered, and still unjustly withholds, &c.

READ.

Entry sur disseizin, cum titulo.

—wherein he demands &c., whereof the said A unjustly disseized C, the father of said B, whose heir he is; and saith, that the said C was seized &c., within thirty years &c.; and the said A thereof unjustly disseized him. And from the said C the right descended to the said B [plaintiff], as son and heir of the said C. And the said A still unjustly withholds, &c.

READ.

Same, in the Per.

—into which the said E hath no entry, but by H, who demised it to him, and thereof unjustly disseized G, the father of the said F [plaintiff], whose heir he is; and saith &c.; and the said H thereof unjustly disseized him, and demised it to the said E. And from the said G the right descended to the said F, as son and heir to the said G. And the said E still unjustly withholds, &c.

READ.

Same, in the Per and Cui.

—into which the said D hath no entry, but by G, to whom F demised it, who thereof unjustly disseized C, father

of the plaintiff, whose heir he is ; and saith &c. ; and the said F thereof unjustly disseized him, and demised the same to the said G, by whom the said D entered. And from the said C the right descended to the said B, as son and heir of the said C. And the said D still unjustly withholds, &c.

READ.

Same, in the Post.

— into which the said D hath not entry, but after the disseizin which F thereof unjustly did to C, father of the plaintiff, whose heir he is ; and saith &c. ; and the said F unjustly thereof disseized him. And afterwards the said D thereinto entered, and still unjustly withholds, &c. READ.

Entry in the Post for lands entailed ; common recovery.

In a plea of land, wherein the said S demands against the said T seizin and possession of the following parcels of land &c. which he claims as his right and inheritance, and into which the said T hath not entry, unless after the disseizin which H thereof unjustly, and without judgment, hath made to the said T, within thirty years last past : whereupon he complains and says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne, as of fee and right, in a time of peace, within thirty years last past, by taking the esplees thereof to the value of \$—, by the year, and into which the said T hath not entry, unless after the disseizin which H unjustly, and without judgment, hath made to the said T, within the time aforesaid ; and whereupon he complains, that the said T now deforceth him thereof ; and thereupon he brings this suit and proof thereof ; all which is to the damage, &c.

PARSONS.

Count, on intrusion after death of tenant in dower.

— Wherein the said P P demands against the said D, one messuage &c., which he claims as his right and inheritance ; and into which the said D hath not entry, but by the intrusion which he made into them after the death of L, who was the wife of R R, which she held in dower of the gift of the said R R, formerly her husband, the father (or other ancestor, &c.) of the said P, whose heir he is ; and thereupon he says, that the said R R was seized of the messuage aforesaid, with the appurtenances in his demesne as of fee, in a time of peace, (*within thirty years last past**)

* In Stearns on Real Actions, p. 443, is a count on intrusion, in which, instead of the words " within thirty years last past," the particular day of the seizin is set

taking the esplees thereof to the value &c. ; and being so thereof seized at &c., died &c., after whose death the said L, who was wife of said R, held them in dower of the gift of the said R, formerly her husband, and was seized thereof in her demesne, as of freehold, in a time of peace, within thirty years last past, taking the esplees thereof, to the value &c. ; and from the said R R the reversion of the messuage aforesaid, with the appurtenances, descended to the said P P, as son and heir &c. ; and afterwards, to wit, on &c., at &c., the said L died seized of the estate aforesaid ; and into which, &c. *Booth, 182.*

NOTE. If the wife come to her dower by recovery, or the reversion be purchased of the heir, the declaration varies according to the writs, as in the Register. *Booth, 182. (MSS.)*

On intrusion after death of tenant by curtesy.

— Wherein the said P P demands against said D, one messuage &c., which he claims as his right and inheritance ; and into which the said D hath not entry, unless by the intrusion, which he made into them after the death of E, who held them as tenant by the curtesy after the death of A A, formerly his wife, mother (*or otherwise*) of the said P P, whose heir he is ; and thereupon the said P says, that the said E and A, in right of said A, were seized of the messuage aforesaid with the appurtenances, in their demesne as of fee, in a time of peace, (*within thirty years last past*) taking the esplees thereof to the value &c. ; and so being thereof seized, the said A, at &c., died ; after whose death the said E held the same as tenant by the curtesy ; and was thereof seized in his demesne as of freehold, as tenant by the curtesy, in a time of peace &c., taking the esplees thereof to the value &c. ; and from the said A the reversion of the messuage aforesaid, with the appurtenances, descended to the said P, as son and heir of said A ; and afterwards, to wit, on &c., at &c., the said E died seized of the estate aforesaid ; and into which, &c. *Booth, 182.*

See the note to the preceding count. Under the statute of limitations of this commonwealth, suppose the wife has been dead over forty, and the husband has been dead more than twenty years, and the intruder has been in possession likewise more than twenty years, what remedy has

forth, and he remarks in a note, that "this time is not limited to thirty years." *Quere.* As the law does not appear to be clearly settled on this subject, or with regard to the proper manner of declaring, and as the demandant has a right to enter any time within twenty years after the death of the doweress, it would be better for the demandant, whenever it can be done, to make an entry, and then, if necessary, to bring a Writ of Entry on his own seizin.

the heir of the wife? He cannot enter, because the statute of limitations restricts him to twenty years. He cannot maintain a Writ of Right on the seizin of the wife deceased, because she has not been seized within forty years. The husband's seizin of his tenancy by the curtesy, is nothing except as a continuance of the wife's seizin, for the heir does not claim through the husband. What remedy can the demandant have? It seems, the above count will answer, if he has any remedy at all.

Count, after death of tenant for life.

— Wherein the said P P &c. demands against D D, one messuage &c., which he claims to be his right and inheritance, and into which the said D hath not entry, unless by the intrusion which he made into them after the death of C, to whom the said P demised the same for the life of said C; and thereupon he says, that he was seized of the messuage aforesaid &c., in his demesne as of fee, in a time of peace (*within thirty years last past*,) taking the esplees thereof to the value &c.; and being so seized thereof, demised the messuage aforesaid, with the appurtenances to the said C, for the life of said C; by virtue whereof the said C was seized thereof in his demesne as of freehold, in a time of peace &c., taking the esplees thereof to the value &c.; and the same C afterwards died seized &c., and into which, &c. *Booth*, 183.

NOTE. For counts in the *per*, *cui* and *post*, and for the heir upon the demise of ancestor, &c. upon the assignment of the heir, when the reversion is purchased, *see* *Rast.* 415; *Booth*, 183. (*MSS.*)

Cui in vita. — Count on estate in fee simple.

— Wherein the said P P, who was the wife of L, demands against D D, one messuage &c. which she claims to be her right and inheritance, and into which the said D hath not entry, but by said L, formerly the husband of said P, who demised it to him, whom she, in his lifetime, could not contradict; and thereupon the said P says, that she was seized of the messuage aforesaid, with the appurtenances in her demesne as of fee, in a time of peace &c., (*within thirty years last past*,) taking the esplees thereof, to the value &c. and into which, &c. *Booth*, 186.

Count by husband and wife on an estate tail of wife.

— Wherein the said A, and C, his wife, demand against D D, one messuage, &c., which they claim to them and the heirs of the body of said C and R, formerly her husband, issuing, of the demise which L M made thereof to the said C and R, and into which the said D hath not entry, but

by said R, who demised it to him, whom she, in his lifetime, could not contradict &c., and thereupon they say, that the said L M was seized of the tenements aforesaid with the appurtenances, in his demesne as of fee, and being so seized thereof, gave the messuage aforesaid with the appurtenances, to the said C and R, and the heirs of the body of the said C and R lawfully begotten; by virtue of which gift, the said C and R were thereof seized in their demesne as of fee, by the form of the said gift, in a time of peace, within thirty years last past, taking the esplees thereof to the value &c.; and afterwards the said R died; and the said C survived him and took to husband the said A, and in to which, &c. *Booth, 187; Rast. 139, a.*

NOTE. 1. In this count the gift in tail is alleged as a demise. 2. That in the count the estate tail must be set forth in the beginning. 3. So, if the estate tail or an estate for life were limited by way of use, the deed of uses must be set forth in the count, as in Co. Ent. *cui in vita.* *Booth, 187. (MSS.)*

Ad communem legem.

—And whereupon the said P says, that S S, the father of the said P, was seized of the messuage aforesaid, with the appurtenances, in his demesne, as of fee, in a time of peace (*within thirty years last past,*) taking the esplees thereof to the value of &c.; and being so seized thereof, the said S S, at &c., took to wife the said C; and from the said S S the right descended to the said P, who now demands, as the son and heir &c.; and into which the said D hath not entry but by said C, who was the wife of said S S, who demised it to him, who held the same as tenant in dower of the gift of said S S, formerly her husband, the father of said P, whose heir he is, &c. *Booth, 191, 192.*

Dum fuit infra aetatem. — Count on infant's own seizin and demise.

Wherein the said A, who is of full age &c., demands against D, one messuage &c., into which the same D hath not entry, but after the demise, which the said A, while he was under age, made thereof, &c.; and whereupon he says, that he was seized in his demesne as of fee and right, in a time, &c. (*within thirty years last past;*) and into which, &c. *Booth, 194.*

Count on demise of ancestor.

Into which the said G hath not entry, but by E E, the father of said F, whose heir he is, who demised the same to

said G, while he was under age &c., and whereupon he says, that the said E, the father of the said F, whose heir he is, was seized thereof in his demesne, as of fee and right &c. *Booth*, 194; *Reg.* 229; *Rast.* 248, b,

Ad term qui prat. — Count by demisor.

And whereupon he says, that he was seized of the messuage aforesaid, with the appurtenances, in his demesne as of fee, in a time of peace (*within thirty years last past*,) taking the esplees thereof, to the value of \$—, and being so seized, on &c., at &c., demised the messuage aforesaid, with the appurtenances, to the said E, for the term of — years then next ensuing, and fully to be completed; and into which the said E hath not entry, but after the demise which said P P made thereof to the said E, for a term which is past, and which after that term ought to revert to said P P, whereof he complains that the said E deforceth him, &c. *Booth*, 196; *Rast.* 25.

Count by heir.

And whereupon he says, that the said E E, the cousin of said P P, whose heir he is, was seized of the said messuage, with the appurtenances, in his demesne as of fee (*or in his demesne as of fee and right*,) in a time of peace (*within thirty years last past*,) taking the esplees thereof to the value of \$—; and being so seized thereof, demised the same to the said H, for a term which is past; and from the said E E, the right &c., descended to one F F, son and heir &c., and from the said F, the right &c. descended to one G G, as son and heir; and from the said G, son of F, the right &c., descended to the said P P, the now demandant, as son and heir &c., and which, after the same term, ought to revert to the said P P, &c. *Rast.* 25, b.

Casu proviso.

Whereupon he says, that the said E E, father of the said P P &c., was seized of the messuage aforesaid, with the appurtenances, in his demesne as of fee, in a time of peace (*within thirty years last past*,) taking the esplees &c., and which, after the demise made by G, who was wife of said E E, who demised the same to H, who held it in dower of the gift of the said E E, sometime her husband, the father of the said P P, whose heir he is, ought to revert in fee to the said P P, by the [law of the land.] See *Booth*, 198; F. N. B. 473.

NOTE. Where a widow aliens land held in dower, to another in fee, &c., the heir or assignee of the reversion immediately after her death may enter, and then bring a Writ of Entry on his own seizin.

The reader will take notice, that the demandant may always adopt the same course, where his entry is not taken away; and as it simplifies the proceedings, it is recommended, in every case where it can legally be adopted.

Ayel, Besayel, Cosinage.

Ayel. — Count on grandfather's seizin.

— Whereupon he says, that the said E E, the grandfather &c., was seized of a messuage &c., in his demesne as of fee, in a time of peace &c. (*within thirty years last past*,) taking the esplees thereof to the value of \$—; and from the said E E, the grandfather, &c., the right &c., descended to the said P P, who now demands as cousin and heir of the said E E, to wit, as son of F F, son of the said E E, &c., and of which [the said E E was seized in his demesne as of fee upon the day in which he died.] *Booth, 201; Rast, 286.*

Or thus.

— Whereupon he says, that the said E E, the grandfather (*within thirty years last past*,) was seized of the messuage aforesaid, with the appurtenances, in his demesne as of fee &c., and of the same estate died seized; and from the said E E, the fee &c. descended to one F F, as son and heir &c.; and from the said F F, the fee descended to the said P P, the now demandant, as son and heir &c., and of which, &c. *Booth, 201; Rast. 28, 29.*

Cosinage.

— Whereupon the said P P says, that the said E E (*within thirty years last past*,) was seized &c. in his demesne as of fee, in a time of peace &c. and of the same estate, and being seized of the same estate thereof, died without heir of his body issuing; after whose death, the fee resorted to one B B, as his paternal aunt and heir, to wit, as sister of C C, his father; and from the said B B the fee descended to one E E, daughter and heir &c.; and from the said E E the fee descended to said P P, who now demands as son and heir, &c. *Rast. 29.*

Nuper obiit.

— And whereupon he says, that the said A A, father &c., was seized of the whole of the tenements aforesaid,

with the appurtenances, whereof &c. [the said D deforceth the said P P and Q Q of their reasonable parts &c.,] in his demesne as of fee and right, in a time of peace (*within thirty years last past,*) taking the esplees thereof &c.; and thereof being seized, *lately died*; and from the said A A, the right &c. descended to the said P P and Q Q, the now demandants, and the said D D as daughters and heirs &c., which said D holds the whole of the tenements aforesaid, and deforceth the said P and Q, of their reasonable parts thereof. *Booth, 205; Rast. 440.*

Quod ei deforceat.

— Wherein the said P P demands against T T, one messuage, &c., which he claims to hold for the term of his life, and whereof the said T deforceth him; whereupon he says, that he was seized of the tenements aforesaid, with the appurtenances, in his demesne as of freehold, in a time of peace (*within thirty years last past,*) taking the esplees thereof to the value of \$—, and into which, &c. *Booth, 254; Rast. 537.*

NOTE. The demandant need not set forth of whose lease he was seized, because the action is brought of his own possession. *Booth, 255.*

Miscellaneous other counts in various Real Actions, &c.

Lessor v. Lessee, and terminum qui preterit.

In a plea of land, wherein the said A [plaintiff] demands against the said B [defendant] possession of a messuage, in &c.; whereupon the plaintiff says, that he, within thirty years now last past, being seized of the demanded premises, in his demesne as of fee, on &c., demised the same to the said B, for a term which expired on &c.; after which, the premises ought to revert to the plaintiff, and he to be in quiet possession thereof; but the said B hath since unlawfully entered thereinto, and holds the plaintiff out; to the damage, &c.

NOTE. This writ lies not against a tenant at will or sufferance. *Plowd. 139, 274.*

By a town for town lands.

To answer to the inhabitants of B, whereof B P, Esq., of the same B, sheriff of the same county, is one, in a plea of land, wherein the said inhabitants demand against the said L, a tract of land, &c.; whereupon the demandants

say, that in a time of peace, within thirty years last past, they were seized of the demanded premises, taking the esplees thereof, to the yearly value of \$—, and still ought to hold and possess the same; yet the said L hath since unlawfully entered thereinto, and ejected the demandants, and still unlawfully withholds the premises from them; to the damage, &c.

PRATT.

NOTE. This writ was directed to a coroner; but this is no longer necessary. St. 1817, ch. 13.

On plaintiff's own seizin.

In a plea of land, wherein &c.; for that the plaintiff was lawfully seized of the tenements aforesaid &c., in her own right as of her own inheritance, in a peaceable time, within thirty years last past, taking the esplees thereof, at the rate of \$— a year, and ought still to hold the same accordingly; yet the said I [defendant,] hath since entered into the premises, and thereof unjustly disseized and ejected her, and still, &c.

READ.

Two coparceners v. a third coparcener.

In a plea of land, wherein the said S and T demand against the said R, seizin and possession of two undivided third parts of &c., with the appurtenances thereof; and thereupon they say, that the said S, in her right, and the said T, in her right, on &c., were seized of and in the said premises, in their demesne, as of fee, as coparceners with the said R, each of one undivided third part thereof, taking the profits thereof, to the yearly value of \$—. And the said S and T ought now to be in quiet possession of their said parts with the said R, all as coparceners; yet the said R hath since unjustly, and without judgment of law, ejected them out of the same lands, and still deforceth them thereof, &c.

DANE.

On plaintiff's own seizin, for part of a grist-mill.

In a plea of land, wherein the said A demands against the said T, possession of two undivided fourteenth parts of a certain grist-mill, with the privileges and appurtenances thereof, situate in &c.; whereupon the said S complains and says, that he, in a time of peace, within thirty years last past, was seized of &c., [as above] in his demesne as of fee, taking the profits thereof, to the yearly value of \$—, and ought still to be in possession thereof; yet the said T

unjustly, and without judgment, hath entered into the premises and disseized the plaintiff thereof, and still unjustly holds him out, &c.

For lands undivided, devised, partition made and set off to plaintiff by execution, with special statement of title.

— wherein the said P demands against the said D [defendant,] possession of two undivided third parts of a certain piece of land &c.; also possession of two undivided third parts of a certain piece of land, situate &c.; whereupon the plaintiff says, that W A, of &c., was on &c., seized in his demesne as of fee, of certain lands in &c., including the demanded premises, and then and there duly made and executed his last will and testament in writing, and therein and thereby devised the same lands and demanded premises to eight of his children, in fee simple, to be divided into eight equal parts among them, viz. A, B, C, D, E, F, G, and H. And thereafterwards, the said W A, on &c., died so seized. And thereafterwards, the same day, the said eight children entered into the said lands, including the demanded premises, and became seized thereof in fee simple. And afterwards, on &c., the same will was duly proved, approved and allowed. And afterwards, on &c., the plaintiff having purchased said A's share, said F's share, said G's share, and said H's share, by their four several deeds, duly executed, acknowledged, registered, and in court to be produced, except their rights assigned as dower to the widow of said W A, and except their shares in parts of said land sold to I S, partition was made, between the plaintiff on one part, and the said B, C, D, and E, on the other part, of the lands devised in and by said will as aforesaid, to the said eight children; and there was assigned to each one, his and her share, according to the true intent thereof; and in the same partition, the two pieces of land above described, two parts whereof the plaintiff demands in this writ, with three other pieces, part of the said devised estate, were assigned and set off to the said B, C, D, and E, to hold in fee simple, and in equal parts. And afterwards, on &c., further partition was made between the said C and I, her husband, on the one part, and the said B, D, and E, on the other part; and therein and thereby were duly assigned and set off to the said B, D, and E, to hold in fee simple and equal parts, the same two pieces of land above described; and they continued to be seized thereof. And afterwards, the plaintiff, by the consideration of our

justices of our Court of Common Pleas, holden &c. on &c., recovered judgment against the said D and E, for the sum of \$— debt, and \$— costs of suit, as by the record thereof, in the same court, appears. And afterwards, on &c., he sued out, in due form of law, his execution on the same judgment. And afterwards, on &c. the said D and E, being then seized of said two undivided parts of said two described pieces of land, he, the plaintiff, caused his said execution to be levied and extended thereon, in due form of law; and then and there, by force of the same levy, he became seized of the same two undivided parts of said two pieces of land, in part satisfaction of the same execution, and ought now to be in quiet possession; yet the said D [defendant,] hath illegally entered the same, and continues to keep the plaintiff out of the same.

DANE.

NOTE. Where lands are set off on an execution, it is always best to declare on the plaintiff's seizin generally, as in common cases, and leave the regularity of the proceedings to be proved in evidence; for if the title by execution be stated, and any requisite be omitted, the declaration will be bad.

By proprietors, upon their own seizin.

To answer to the proprietors of the common and undivided lands in Dorchester aforesaid, who sue by A and B, of &c., a committee for that purpose appointed, in a plea* of *entry on disseizin*, wherein they demand of the said D [defendant,] the possession of a certain piece or parcel of meadow-land, now in W, in the county aforesaid, but formerly within the bounds of Dorchester aforesaid, containing &c. bounded &c., with the appurtenances thereof; of which the said D unjustly, and without judgment, disseized the demandants, within thirty years last past; whereupon the said proprietors, by the said committee, say that they themselves on &c., were seized of the demanded premises, and their appurtenances, in their demesne as of fee, taking the esplees thereof, to the value of \$—, and still ought to have the same; yet the said D unjustly and without judgment, *viz.* within thirty years last past, entered on the premises, disseized the demandants thereof, and still unjustly deforceth them thereof; to the damage of the said proprietors, as they by the said committee say, &c.

KENT.

By tenants in common, heirs of devisee, of part of a remainder.

— Wherein the said P and M, his wife, in her right,

* In a plea of land.

and the said S, demand against the said D possession of one undivided third part of the following pieces of land &c. And thereupon the said P and M, in her right, and the said S, complain and say, that W, of &c., and grandfather of the said M and S, on &c., being seized of the said tenements, with the appurtenances, in his demesne as of fee, taking the profits thereof, to the yearly value of £—, duly made and executed his last will and testament in writing, and therein and thereby, among other things, devised the tenements aforesaid &c. to Anna, his wife, to hold and improve, *so long as she should remain his widow and unmarried*; and in case she married again, he then devised in and by said will, that she should improve one third part of his real estate, in &c. for life. And by the same will he further devised the same tenements, with the appurtenances, to his four children, S, I, K and L, to hold to them and their heirs, *from and after the death of the said Anna*, the wife, and equally to be divided between them, the said two daughters, the sum of £— each, which they had before, in and by the said will, being first allowed for &c. And the said testator, thereafterwards, on &c., died so seized of the said tenements &c.; and the said will of the said W, was thereafterwards, on &c., duly proved, approved, and allowed; and the said Anna there, the same day, entered into the same, and by force of the same will, became seized thereof in her demesne, *as of freehold, for the term of her life, determinable as aforesaid*; and the said four children became seized, as of fee and right, of and in the remainder of the same tenements and appurtenances, *expectant on the death of the said Anna*. And afterwards, on &c., said S died intestate, so seized, as of fee and right, of his share in said remainder, leaving the said M and S [plaintiffs,] his daughters and heirs, who there the same day, became seized, as of fee and right, of his share in the said remainder. And thereafterwards, on &c., the said Anna died so seized of the said tenements &c., *as of her freehold, as aforesaid*, the said I, K, L, [testator's children,] M and S [plaintiff's] then and there remaining seized as aforesaid of the said remainder; by means whereof, and by force of the said will, and of the laws in such case made and provided, one undivided third part of the said tenements &c. came and belonged to the said M and S, to have and to hold the same &c.; and the said P and M, in her right, and the said S, ought now to be

in possession thereof, accordingly ; yet the said D hath illegally entered into the same, and unjustly holds them out.

DANE.

For lands devised by husband of devisee, as heir to the heir of devisee.

— Wherein he demands against the said B, a messuage &c., and saith, that on &c. one Y was seized of the premises aforesaid &c., in his demesne, as of fee ; and being so seized thereof, by his last will in writing of that date, July proved, approved, and allowed, devised the same to F, his wife, *to hold and improve during her widowhood* ; and by the same will further devised the same premises &c. to his daughter M, to hold to her and her heirs, from and immediately *after the death or marriage of the said F*, whichever should first happen. And afterwards, on &c., the said Y died so seized thereof ; after whose death the said F entered into the demanded premises, and by force of the devise aforesaid, became seized of the same, as of freehold, for the term of her life, determinable on her marriage ; and the said M was thereupon seized, as of fee and right, of and in the remainder of the same demanded premises, expectant upon the death or marriage of the said F. And the said M, being so seized of the remainder aforesaid, took to husband the said N [one plaintiff ;] by force whereof, the said N and M were seized of the aforesaid remainder of the demanded premises, *as of fee and right, in right of the said M* ; and afterwards had issue between them, lawfully begotten, to wit, I. And afterwards, on &c., the aforesaid N and M being so seized of the remainder of the demanded premises in form as aforesaid, in her right, she, the said M, at &c., died thereof so seized ; after whose death, the remainder in fee of the demanded premises descended to the said I, as only child and heir of the said M ; whereby the said I was seized of the remainder of the demanded premises, as of fee and right, expectant on the death or marriage of said F. And afterwards, on &c., the said I, at &c., died thereof so seized and intestate, having neither wife nor child ; after whose death, the remainder in fee of and in the demanded premises, expectant on the death or marriage of the said F, by force of the law in such case made and provided, came and fell to the plaintiff, father of the said I, as next of kin, to him, the said I, the intestate ; whereby the plaintiff became seized of the remainder of &c. And afterwards, *viz.* on &c., the said F continuing in her widowhood, and being

seized of the demanded premises, in her demesne, &c. as aforesaid, and the plaintiff being seized of the remainder thereof, as of fee and of right, expectant as aforesaid, she, the said F, at &c., died, of such her estate so seized; whereupon the demanded premises came and belonged to the plaintiff, to hold the same, and he ought to be in possession thereof, accordingly; yet the said B, &c. R. DANA.

For lands disseized; Feoffee v. Disseizor.

— wherein the plaintiff demands against the said T a messuage &c., and saith, that on &c., one C was seized of the demanded premises in his demesne, as of fee; and being so seized thereof, then and there, by his deed of that date, duly executed, acknowledged, registered, and in court to be produced, conveyed the same to the plaintiff, to hold to him and his heirs; by force whereof the plaintiff became seized of the demanded premises in his demesne, as of fee, and ought still to hold the same accordingly; yet, &c.

R. DANA.

On seizin of the father by posthumous child.

— wherein the plaintiff demands against the said W possession of &c., whereupon the plaintiff says, that H, late of &c., deceased, intestate, father of the plaintiff, in a time of peace, on &c., was seized of the demanded premises, in his demesne, as of fee, taking the esplees thereof, to the yearly value of \$—; and afterwards, on the same day, died so seized thereof, intestate, leaving S, his widow, pregnant with the plaintiff, who was born afterwards, at &c., on &c.; and after the death of said H, father of the plaintiff, and birth of the plaintiff as aforesaid, the demanded premises, and the right of property aforesaid, descended by law to the plaintiff, only child and heir of the same C deceased; and he ought accordingly to be in quiet possession thereof; but the said W, after the death of the said C, unjustly entered into the demanded premises; and still unjustly, &c.

J. ADAMS.

On devise to father by co-heirs.

To answer to A B, C D, &c. children and co-heirs of B, late of &c., in a plea of land of one fourth part of &c.; for that one C, on &c., was seized of the demanded premises in his own right, as of his inheritance; and being so seized thereof, made his last will and testament of that date, and therein and thereby devised the same to his son I, father of

the plaintiffs, to hold to him and his heirs; and afterwards, on &c., the said C died so seized thereof; and on &c., his said will was duly proved and allowed; whereby the demanded premises fell to the said I, father of the plaintiffs, and he was accordingly seized thereof in fee, and afterwards, on &c., died so seized thereof; and the same thereupon descended to the plaintiffs, his children and co-heirs, and they ought of right to hold the same accordingly; yet the said X [defendant] hath entered into the same, and unjustly ousted the plaintiffs, &c. READ.

Entry sur disseizin in the Post; by surviving child, on the seizin of the grandfather.

To answer to T and M, his wife, in her right, in a plea of land, wherein they demand, in right of said M, against the said S, one undivided fourth part of &c., and into which the said S hath not entry, but after the entry and abatement, which one P, now deceased, within thirty years last past, unjustly, and without judgment of law, made, under whom the said S claims and holds; whereupon the said T and M, in her right, complain and say, that one X, late of &c., deceased, father of D, late of &c., deceased, and grandfather of the said M, in a time of peace, within thirty years last past, was seized in his demesne, as of fee, of the whole of the above described premises, taking the profits to the yearly value of \$—. And afterwards, on &c., at &c., the said X died so seized, and intestate; whereupon the whole of the above described premises descended and came, in fee simple, to his son F, to his four daughters A, B, C, E, and to G and to the said M, his grandchildren, and children of the said D, who died in his life; to wit, two seventh parts of the above described premises to the said F; one seventh to said A; one seventh part to said B; one seventh to said C; one seventh to said E; and one seventh to said G and M. And afterwards, on &c., at &c., the said G died intestate, under age, unmarried, and without issue, and without having parted with his right in the premises; whereby the same descended and came to the said M, his sister and heir; by force of all which, and of the premises, the said M became seized of the right of one seventh part of the premises; and the said T and M, in her right, ought to have and be in possession of the same; yet the said S hath unjustly, and without judgment of law, entered into the same, &c.

On fee simple conditional estate.

And now the said O demands against said P the possession of &c.; whereupon the appellant complains and says, that I O, late of &c., at &c., on &c., was seized of the demanded premises in fee simple; and being so seized thereof, there on the same day, made and duly executed his last will and testament in writing, and therein and thereby, among other things, devised the demanded premises to his son I O, as a *fee simple conditional estate*; and did devise and order, in and by the same will, that if the said I should die without leaving any child, lawfully begotten of his body, leaving M O, his brother, alive, that then the demanded premises should go to, and become the estate of the said M. And the said testator, there, on &c., died so seized as aforesaid, of the demanded premises; and the said I O, on the same day, entered upon the demanded premises, by force of the same will; and the same will, on &c., was duly proved and allowed; and the said I O thereupon became seized of the demanded premises, as of a fee simple conditional estate, according to the form of the devise aforesaid, and continued to be so seized thereof, until &c., at which time the said P entered, unjustly and unlawfully, and by fraud, upon the demanded premises. And the said I O thereafterwards, on &c., died, leaving no issue of his body lawfully begotten; by means whereof, and by force of the devise aforesaid, the right in and to the demanded premises descended and came to the said M in fee simple. And the said M there, on &c., died, leaving the appellant his only son and heir; by means whereof, the right in and to the demanded premises descended and came to him, the appellant, in fee; and he ought now to be in quiet possession thereof, accordingly; but the said S, on a disseizin which he committed against the said I O in his lifetime, hath entered and illegally continues to keep the appellant out of the same.

SULLIVAN and DANE.

Writ of right upon a disseizin of ancestor.

To answer B and E, his wife, in her right, in a plea of land, wherein they demand against said D, one undivided moiety &c., as the right and inheritance of the said E; and thereupon they say, that one W, father of said E, was seized of the demanded premises, with the appurtenances in his demesne, as of fee and right, in a time of peace, and within forty years last past, by taking the profits thereof, to the

yearly value of \$—, and continued so seized until the said D thereafterwards, on &c., unjustly, and without judgment of law, entered into the same demanded premises, and thereof disseized the said W, who thereafterwards, on &c., died seized of the right in and to the demanded premises, with the appurtenances; from whom, thereupon, the said right descended and came to the said E, his daughter and heir, by virtue of the laws in such case made and provided; and she became seized thereof in fee; and the said B and E, in her right, ought now to have quiet possession of the same demanded premises; yet the said D unjustly withholds, &c.

DANE.

REAL ACTIONS IN MASSACHUSETTS.

By the Revised Statutes of Mass., Chapter 101, Section 51, all Writs of Right, all Writs of Formedon, and all Writs of Entry, except the Writ of Entry allowed in that chapter, are abolished.

The next section, 52, of the same statute, contains the usual saving for the rights of minors, married women, persons insane, imprisoned or without the United States, who may bring any of the abolished actions within five years after their disability shall cease, subject to the former statutes of limitation, &c.

By the Writ of Entry, which is allowed, any estate in fee simple, fee tail, or for life, may be recovered unless when a different action is prescribed by law. *Section 1 of the same statute.*

Section 2. Prescribes the mode of declaring. The demandant may declare on his own seizin, within twenty years last past, without specifying any particular day, alleging a disseizin by the tenant, without averring a taking of the profits by himself.

Section 3. He then sets forth the estate, that he claims, in the premises, whether fee simple, fee tail, or for life, and if for life, whether for his own life or for the life of another, without setting forth the original gift, &c. or other conveyance or title under which he claims.

Section 4. By this section a mere right of entry is made sufficient proof of an actual seizin; but this right of entry is made essential and indispensable to his recovery.

Section 5. No descent or discontinuance takes away any right of entry or of action for the recovery of real estate.

Section 6. Any person in possession, claiming a freehold estate, may be considered a disseizor, &c.

Section 7. If the person in possession, though claiming an estate less than freehold, shall have actually ousted the demandant, he is disseizor at the demandant's election.

Section 8. Makes a right of entry equivalent to an actual entry, &c.

Under this last section, if A makes an estate to B, on condition, and

the condition is broken, shall A maintain a writ of entry sur disseizin, without an entry? The entry at common law is necessary to enable A to take advantage of the forfeiture. Until he enters, B's estate, though defeasible, is not defeated. Shall the mere bringing of the action, operate as an entry? If so, suppose A commences an action, and then discontinues; will the commencement of the action operate as an entry, so that, if A has the better title, he can maintain trespass against B, for subsequently retaining possession, &c. *Quære.*

Again; in order to recover, the demandant must be seized, but if so, then a right of entry, gives a seizin without actual entry. But, in the case last mentioned, if A has a right of entry for condition broken, and without actual entry, becomes seized, then either B's estate is defeated without entry, and so no action is necessary for A to recover his land, or he must make a false surmise in his writ, viz: that he was seized, when he was not seized. For, on the supposition, that bringing the action is equivalent to an entry, it cannot act retrospectively and cause him to have been previously seized.

Again; in the case of a condition broken, ought not the grantor to do some act, by which the estate should be re-vested in him, and by which the grantee should have notice, that the grantor intends to take advantage of the forfeiture, before bringing an action? The Legislature probably did not intend to go so far, as to enact that on the breach of a condition, the estate of the grantee should be divested and the grantor re-seized of the estate without further act, and whether he wished to take advantage of the breach or not; and however unlimited their authority may be supposed to be, they cannot legislate contrary to the fact, that a man was seized of an estate, when he was not. Perhaps it would be safer therefore, as it actually would be more technical, for the grantor to make an actual entry, before he brings his writ of entry, in cases where his title depends on a breach of condition.

Again; as the demandant is entitled to recover damages from the time when his title accrued, shall he recover damages from the time of the breach of the condition? This would seem unreasonable, for the tenant, after a breach of the condition, might continue in the occupation of the premises many years, supposing the grantor to have waived the breach, without notice from him that he intended to take advantage of it. But, if the damages are to be computed merely from the commencement of the suit, they will be almost merely nominal.

In the case of *Poignard v. Smith*, 6 Pick. 163, it was held, that a sheriff's deed of an equity of redemption, if the mortgagor was disseized at the time of sale, would give no seizin to the purchaser. *Quære* of this, because the mortgagor might have been disseized at election, and if so, why might not the purchaser, having all the mortgagor's rights transferred to him by the sheriff's deed, have a right also to consider him as not disseized? In that case the point was not suggested, and it was held that the demandant could not recover on his own seizin without an actual entry. But, this difficulty is obviated by making a right of entry equivalent to an actual entry; agreeably to section 8.

The following form is drawn with express reference to the Revised Statutes of Massachusetts.

Summon John Smith, of &c., merchant, to answer to Benjamin Smith, of &c., yeoman, &c., &c., in a plea of

land, wherein the said Benjamin demands against the said John, ten acres of land &c., situate &c., which the said Benjamin claims *as his right and inheritance (as the case may be.)* Whereupon the demandant says, that he was seized of the demanded premises *in his demesne as of fee, (as the case may be,)* within twenty years last past, until the said John Smith unjustly and without judgment disseized him thereof.

NOTE. *For the description of the demandant's estate, see ante, Introduction, Chapter 12.* The statute seems to have abolished all distinctions in degree between the various Writs of Entry, and as it is made unnecessary to set forth the original title, under which the demandant claims, and which he might reasonably be supposed to know, *a fortiori*, he seems not to be required to set forth the tenant's title, with which he may be supposed to be unacquainted.

ON MORTGAGES.

As soon as a mortgage is executed, the mortgagee is entitled to the occupation of the land, if there is no stipulation in the mortgage to the contrary, and for the purpose of obtaining it may bring an action counting on his own seizin, as of fee, and *in mortgage*. 3 Mass. R. 138.

A similar action may be brought by the executors or administrators, or assignees of the mortgagee *ad infinitum*, and varying the count accordingly. 5 Mass. R. 240.

This action may also be brought against the assignees or grantees of the mortgagor, and indeed against any person in possession. 11 Mass. R. 216. Disclaimer is no plea. Because grounded on statutes. But if two closes are mortgaged to A, and the mortgagor afterwards conveys one of the closes to B, and the other to C, A must sue severally. 7 Mass. R. 355. So, if part of the land is conveyed to A and part to B. 12 Mass. R. 474.

But why should a mortgagee, who finds three or four persons have entered on the mortgaged premises, be bound to know whether they claim or occupy jointly, or severally? Why should he be obliged to ascertain the limits of their respective claims? As the suit is *in rem*, why should the demandant be obliged to apportion it among persons whose pretensions, as respects him, are wholly unknown and arbitrary? There would be no hardship in compelling each of the defendants to set forth in his plea his title, with which he ought to be acquainted, with a disclaimer of any thing more. It would be more just, that they should sever in their pleas, and if judgment was in favor of any of them, to let them have their costs; and to let judgment go against the rest.

Where land is conveyed to A and B in mortgage, to secure a debt due to them jointly, they are joint-tenants, and if one dies, the other must sue alone. 7 Mass. R. 131. But, if they sue jointly and fore,

close the mortgage, they become tenants in common by the foreclosure. 11 Mass. R. 469.

Where a reversion or remainder is mortgaged, this action lies by the mortgagee to foreclose, during the continuance of the particular estate. 13 Mass. R. 429.

Where the action is brought by an administrator or executor, under the statute, he should state the capacity in which he sues, and should count on the seizin of the testator or intestate. But an administrator of a person deceased, appointed in another State, can neither sue a mortgage of lands in this State, nor by delegation or assignment of the mortgage enable a resident of the State to do it. *Cutter v. Davenport*, 1 Pick. 81.

The manner of declaring on Mortgages.

The Revised Statutes of Massachusetts, direct the mode of declaring in actions on mortgages. The mortgagee or the assignee of the mortgagee, may declare on his own seizin, in a writ of entry in common form, against the tenant of the freehold, whether the mortgagor or his assignee, without mentioning the mortgage deed, or the condition or defeazance.

As the mortgagor or his assignee, will of course have a right to redeem, the demandant will be entitled to the conditional judgment, that if the defendant shall, within two months, after the judgment, pay to the plaintiff the sum found due on the mortgage, with interest and the costs of the suit, the mortgage shall be void, and the defendant shall hold the premises discharged thereof, otherwise that the plaintiff shall have his execution for possession, &c. Chap. 107, sections 3, 4, 5.

If the defendant is not the mortgagor, and does not claim under him, he shall not be entitled to the conditional judgment, unless with the consent of the plaintiff; but the suit shall be conducted in all respects like a Writ of Entry. *Ibid.*

Section 4. The judgment may in all cases be entered for possession, as at common law, unless one of the parties shall move for the conditional judgment.

Section 8. Where the action is against any other person than the mortgagor, the mortgagor *may be joined*, but if he has no estate in the premises, and makes no defence, he shall not be liable to pay any costs.

DECLARATIONS ON MORTGAGES.

Mortgagee v. Mortgagor, under the Revised Statutes of Massachusetts.

To answer to L M, of &c., in a plea of land, wherein the said L M demands against the said T, the possession of a certain parcel of land, situate &c. Whereupon the said L M says, that he was lawfully seized of the demanded premises, with the appurtenances, in his demesne as of fee, within twenty years last past, and ought now to be in quiet possession thereof, but the said T hath since unjustly entered, and holds the plaintiff out, &c.

NOTE. The above concise form contains all that seems to be required under the Revised Statutes, and will answer equally well for the cases of mortgagee v. mortgagor, mortgagee's assigns v. mortgagor or his assigns, an executor or administrator of mortgagee or his assigns v. mortgagor or any person claiming under him, or a mere disseizor or intruder. An assignee of mortgagee will count on his own seizin.

Under Revised Statutes, ch. 65, sec. 11, an executor or administrator may take possession of mortgaged premises by open and peaceable entry, or by action, as the deceased mortgagee might have done.

By section 12, if the land is redeemed, the executor or administrator will release; if the estate is not redeemed, the executor will hold the real estate in trust, (*as if it were personal estate*) for the creditors or next of kin, as the case may be.

It would seem therefore, that the preceding form will answer for an administrator, counting on his own seizin. For, he cannot enter without having a right of Entry, and by ch. 101, sec. 4, a right of Entry is made equivalent to an actual entry; it would seem therefore, that the administrator or executor, may count on his own seizin, without the necessity of making an actual entry; yet, perhaps, in some special cases, it may be safer for him to enter before he brings his action.

Mortgagee v. Mortgagor.

In a plea of land, wherein the plaintiff demands against the said R S the possession of &c. [*describe the premises*;] whereupon the plaintiff says, that the said R, being seized of the demanded premises in his demesne as of fee, on &c., by his deed of bargain and sale and of mortgage, of that date, duly acknowledged, registered, and in court to be produced, for a valuable consideration therein expressed, conveyed the demanded premises to the plaintiff, to hold the same to him and his heirs, in fee and in mortgage; by force whereof the plaintiff became seized of the demanded premises, in his demense, as of fee, and in mortgage, and ought now to be in quiet possession thereof; but the said R S hath since unjustly entered, and holds the plaintiff out; to his damage, &c.

THACHER.

Administratrix of Mortgagee v. Mortgagor's tenants.

— Wherein the said B [administratrix,] in her said capacity, demands against the said T and U [defendants,] possession of a certain dwellinghouse &c.; for that one I G, on &c., being seized in his demesne, as of fee, of the demanded premises, by a certain indenture of that date, made by and between the said I G and J [intestate,] one part whereof, sealed with the seal of the said I G, by him acknowledged, and being duly registered, the said B now here in court brings, for a valuable consideration therein ex-

pressed, conveyed the same to the said J, to hold to him, his heirs and assigns, upon this condition, *viz.* that if the said I G, his heirs, executors, or administrators, shall well and truly, pay the said J, his heirs, executors, or administrators, the sum of \$—, with lawful interest for the same, on or before &c., without covin or delay, then the same deed of indenture to be void; otherwise to remain in full force and virtue; by force whereof, the said J, in his lifetime, became seized of the demanded premises in his demesne, as of fee and in mortgage. And the plaintiff in fact says, that the said I G, his heirs, executors, administrators, or assigns, have never paid the same sum, nor the interest thereof, to the said J, his heirs, administrators, or assigns, according to the condition aforesaid, though requested; and therefore the plaintiff is entitled to, and ought to be in possession of said house &c., to administer the same accordingly, the personal estate being insufficient to pay the debts due at the time of his decease; but the said D and H, have since illegally entered, and unlawfully hold the plaintiff out, to the damage, &c.

Administrator of Mortgagee v. Mortgagor.

— Wherein the said B, in his said capacity, demands possession of &c.; whereupon the said B, in his said capacity, complains and says, that the said K [defendant,] on &c., at &c., was seized of the premises in fee; and being so seized, by his deed of that date, duly acknowledged, recorded, and in court to be produced, for the consideration of \$—, therein expressed, then and there granted, sold, and conveyed the same to the said D [intestate,] to hold in fee and in mortgage; whereby the said D became then and there seized of the premises in his demesne, as of fee and in mortgage, taking the profits thereof, to the value of \$— a year. And the said B saith, that he, in his said capacity, ought to have and be in actual possession thereof, in order to administer the same, according to law; and an action hath, by our law in that case made and provided, accrued to him, in his said capacity, to demand, recover, and have the possession of the same accordingly; yet the said A hath, since that time, entered into the premises, and still withholds the possession thereof from the plaintiff.

BRADBURY.

Second assignee of Mortgagees v. Persons holding under the heir of Mortgagor.

In a plea of land, wherein he demands against the said A, B and C [defendants,] a certain tract of land &c.; whereupon the demandant says, that on &c., one H, then being seized of the demanded premises in his demesne as of fee, by his deed of mortgage of that date, duly executed, acknowledged, recorded, and here in court to be produced, for a valuable consideration therein expressed, conveyed the same demanded premises to W, &c., to hold the same to him, his heirs and assigns, in mortgage; by force whereof, the said W then and there became seized of the demanded premises, in his demesne as of fee, and in mortgage; and being so seized thereof, he there, on &c., by his deed of that date, duly executed, acknowledged, registered, and here in court to be produced, for a valuable consideration therein expressed, conveyed, assigned, and transferred the same, with said deed of mortgage, to one Q, to hold the same to him, his heirs and assigns, and in mortgage as aforesaid; by force whereof, he then and there became seized of the same demanded premises, in his demesne, as of fee, and in mortgage as aforesaid; and being so seized thereof, there, on &c., by his deed of that date, duly executed, acknowledged, and registered, and in court to be produced, for a valuable consideration therein expressed, conveyed, assigned, and transferred the demanded premises to the plaintiff, to hold the same to him, his heirs and assigns in mortgage as aforesaid; by force whereof, he became seized of the demanded premises, in his demesne, as of fee, and in mortgage as aforesaid, and ought now to be in quiet possession thereof; yet the said A, B, and C, have since, and without judgment of law, illegally entered into the demanded premises, dis-seized the plaintiff thereof, and still unjustly withhold the same from him; to the damage, &c. DANE.

NOTE. The mortgage and bond, in this case, were in trust for certain merchants in London.

Where the original deed is lost, a declaration may be made out, with a profert of a registry copy, alleging the original to be lost by time and accident. 3 T. R. 151 to 162.

Mortgagees of moiety of a remainder, on a freehold ended, and partition made of one quarter, after mortgage made, and before action brought.

— wherein they demand against the said T [defendant,] two undivided third parts of two certain tracts of land

&c.; whereupon the demandants say, that one H, being seized in fee of an undivided moiety of the remainder of the above described premises, and of an undivided moiety of another tract of land, situate &c., expectant upon the death of N, her tenant for life of said three tracts of land, and she being then in possession thereof, did, by his deed of mortgage of that date, duly executed, acknowledged, registered, and here in court to be produced, for a valuable consideration therein expressed, convey the same moiety to the said B and M, [Demandants,] to hold the same to them, their heirs and assigns, as tenants in common, in mortgage; by force whereof, the said B and M became seized of said moiety *in fee and in mortgage, and in remainder expectant on the death of said N*. And afterwards, on &c., one quarter part of said three tracts of land, *viz.* said third tract was in due form of law, divided, set off, and assigned to M C, to hold in severalty and in fee; she, at the time of making said mortgage deed, being devisee, and seized of one undivided quarter of said three tracts of land, in fee and remainder as aforesaid; by force whereof, the demandants became seized in their demesne, as of fee and in mortgage, of the said two undivided third parts they now demand, of said first and second tracts aforesaid, and ought now to be in quiet possession thereof; yet the said T [defendant,] without judgment of law, hath illegally entered, &c.

DOWER.

A woman is entitled to dower, if divorced *a mensa et thoro*, or if liable to be divorced *a vinculo*, if the husband dies before the divorce. Co. Litt. 33, a. b.

And a woman, divorced for the adultery of her husband, is entitled to dower of all the lands, of which he was seized at any time during the coverture, as in other cases. 14 Mass. R. 219.

But a woman shall not have Dower, if she marries a man who has a wife living; or, if, when she has a husband living, she marries a second husband. Perk. sec. 304.

If the wife is under nine years at her husband's death, she shall not be endowed; but she may, if she were over a hundred when she married. Co. Litt. 33, a; Perk. ch. 5, sec. 304.

The wife is entitled to dower of a seizin in law, as well as an actual seizin. Co. Litt. 31, a.

So she shall be endowed, where the estate of the husband is evicted

by covin, as by default or rendition of the estate without right. 2 Inst. 349; Perkins, ch. 5, sec. 377, 378, 379, 385, 386.

The wife of a feoffee to uses is not entitled to dower. Co. Lit. 31, b; 2 Co. 77, a.

Where the estate of the husband is evicted by title, she shall not be endowed. 1 Inst. 349; Perkins, ch. 5, 375.

Where the husband has a defeasible estate of inheritance, the wife shall have her dower, until the estate is defeated. 1 Rol. 677.

If A is tenant for life, remainder to B for years, remainder to A in fee or in tail, and dies, his wife shall have dower, but she shall not have execution during the remainder for years. Ld. Raym. 327.

But if A is tenant for life, remainder to B for life, remainder to A in fee or in tail, and dies, A's wife shall not have dower. *Ibid.*

The wife is not entitled to dower where her husband has a descendible freehold, as an estate for the life of another. And where A is tenant for life, remainder to B for life, and B conveys his remainder to A, and A dies, A's wife shall not be endowed. Perk. sec. 334.

Under the Rev. Stat. of Mass. ch. 90, sec. 18, wherever land is devised for a hundred years or more, the term shall be considered as a fee simple, so long as fifty years remain unexpired, and the widow of the deceased lessee, shall be entitled to dower in it, &c.

It is supposed, if the husband dies before the fifty years are expired, the widow may have her dower in the lands leased, to continue until the expiration of the lease, if she live so long, but if she should outlive the term, will her dower continue, in analogy to dower in an estate tail determined, or will it cease with the term?

Where a devise or a bequest, inconsistent with her having dower, is made to the wife, and expressed to be in satisfaction of dower, she must elect. Amb. 468, 730.

A woman is not entitled to dower of a trust estate, nor of an equity of redemption. Nor if a joint tenant makes a feoffment, shall his wife be endowed. The sole seizin is gained only for an instant. Co. Litt. 31, b; 2 Cro. 615. And the law is the same of a conveyance and reconveyance if they are one transaction. 14 Mass. Rep. 351.

As to the wife's dower in mortgaged estates, see Rev. Stat. of Mass. ch. 60, sec. 2.

By sec. 9, of that statute, a woman may be barred of her dower by a pecuniary provision, if assented to by her, as in case of a jointure in lands.

By sections 10 and 11, the widow must make her election in case of jointures made after marriage; as also in case of a provision for the wife, made in the will of her deceased husband, unless it appears to have been his intention that she should have both.

An alien could not have dower at common law, but under statute 1812, ch. 93, sec. 1, she is entitled to it.

If land is given to A and B, as *joint-tenants* for life, remainder to the heirs of A in tail, and A dies, his wife shall not be endowed. Perk. ch. 5, sec. 334.

If D is disseized of land, and afterwards takes wife and dies without re-entry, she shall lose her dower. Perk. ch. 5, sec. 367.

When the lands assigned to a woman for her dower, are lawfully divested out of her, she shall be endowed of the third part of what remains, of which she is dowable, and in which the seizin is not defeated. As where a man is seized of two acres of land by lawful title, and of one acre by disseizin, and, after his death, dower is assigned to the woman of the one acre which her husband held by disseizin and the disseizee enters into that acre, and puts her out, she shall be endowed of the remaining two acres, as if she never had been endowed. See Perk. ch. 5, sec. 179, 180.

Of the Count in Dower.

The count must demand a third part of the whole premises. To demand a certain number of acres of land, &c., though they may be precisely equal to one third, is bad. 3 Lev. 169. The estate in this action, as well as in all other real actions, should be described with so much certainty, that the sheriff may be able to deliver possession of them to the demandant. 1 Str. 625 ; 2 Ld. Raymond, 1384 ; 2 Saund. R. 44, *in notis*.

It is necessary, under the statute of this state, that a demand should be made before bringing the Writ of Dower, and consequently it is necessary that a demand should be set out in the writ.

Further observations.

The general rule with regard to dower, is, that a woman shall be endowed of any lands, &c., whereof her husband at any time during the coverture, was seized, in deed or in law, of such an estate as any issue born between them might inherit. Perkins, chapter 5, section 301.

It is a general exception, that where the husband's seizin is defeated by title paramount, or expires by its own limitation, the wife shall not be endowed ; or, if endowed, shall lose her dower whenever such seizin of her husband so expires, or is defeated. This, however, is not always true, for if tenant in tail dies without issue, so that the estate tail is determined, his wife shall be endowed. See Vin. Abr. Dower, (G) 24 ; F. N. B. 149.

If tenant in tail discontinues in fee, and afterwards marries, and the discontinuee enfeoffs him, and afterwards he dies seized, his heir is remitted, and the wife shall lose her dower. The reason of which is, that the tenant in tail, by the feoffment of the discontinuee after the marriage, is not remitted ; but is seized in fee, *by wrong* ; but the issue in tail is remitted, and holds as issue in tail ; so that the seizin, which the husband gained by the discontinuance and the feoffment of the discontinuee, is defeated, and that seizin being defeated, the woman shall lose her dower.

So, where a man has a right to land, but no right of entry, if he dis-seizes the tenant, and marries and dies, his wife shall not have dower. The reason is, that, by his disseizin of the tenant, he gains a new fee by wrong, which will not coalesce with his absolute right to the land ; because, after the disseizin, the disseizee, though without any absolute right to the land, has a right of entry. But, after the descent, such ten-

ant has lost his right of entry, and the heir having the mere right, and also the right of possession, and possession itself, has a complete title, by remitter to the true title of his ancestor. This seizin by right in the heir, is different from the tortious seizin in fee, gained by the ancestor's disseizin before marriage, and therefore the woman shall lose her dower.

It is a principle, if a man is disseized and dies, the widow may recover her dower of the disseizor, immediately; and is by no means obliged to wait for the heir to recover the land; as, if so, she would be liable to lose her dower by his laches. It is a rule too, that the widow of a disseizor shall have her dower after his death, until that tortious seizin, gained by him, is defeated.

1. Suppose then D, being seized of land, takes a wife, and then is disseized by E, and dies; E also having a wife, dies seized of D's land; D's heir brings no action to recover the land from E's heir; yet D's widow shall recover her dower from E's heir; and E's widow shall recover dower also, which she shall hold until D's heir recovers his ancestor's land from E's heir. This case, though curious, is not improbable.

2. A case of mere curiosity may be supposed, where D, having a wife, is disseized by E, having a wife, who is also disseized by F, having a wife. D, E, and F die. F's heir takes possession. Neither D's heir nor E's brings an action; D's wife shall have her dower, one third of the land of which D, her husband, was disseized by E, and which F's heir holds. E's wife also shall have her dower of one third of the land of which her husband was disseized by F, and which F's heir holds; F's wife shall have her dower in one third of the same land of which her husband died seized. In this way, F's heir will have nothing but a reversion; each of the widows having a good right of dower as respects him.

In both of the above cases, there may be a doubt, whether the assignment of dower to the widows of the disseizees, does not *pro tanto* defeat the seizin of the disseizor's heirs, so that the widows of the disseizors shall have dower in what remains only, after dower has been assigned to the widows of the disseizees. *Ideo quære.*

Again; suppose D, seized of land, marries, is disseized, and after forty years, dies without re-entry, or recovery of the land; shall his wife be endowed of the land of which her husband was disseized? Here it should be observed, — 1. There is no limitation for the writ of dower, unless by implication. 2. The statute of limitations takes away the remedy only, and does not affect the right. 3. The covin of the husband is never suffered to deprive a woman of her dower. 4. She has been guilty of no laches, as she could not do any act whatever during her husband's life. *Before proceeding further, put another case, which, like the preceding, might happen to any woman of sixty years of age;* D, seized of land, marries, is disseized, and after thirty years dies without re-entry. The arguments against the wife's having dower are the same as before, *viz.* the husband's seizin before his death, is defeated by the statute of limitations, so that, if he had brought a Writ of Right, he must have failed in it. To allow her dower out of that seizin, would be repugnant to the principle, that when the husband's seizin is defeated, the widow must lose her dower. But, 5. If the widow is denied her dower in this last case, yet the heir of her husband may, at any time within forty years after the disseizin of her hus-

band, recover the land in a Writ of Right; the seizin of her husband is thus restored; for, it is on that seizin the heir must recover, if at all; will then her right to dower revive? And does it depend, in this case, on the act of the heir, whether she shall have dower in her deceased husband's estate or not? *Quære.*

COUNTS IN DOWER UNDE NIHIL HABET UNDER THE STATUTE.

By husband and wife for the wife's dower in the estate of a former husband.

To answer to R R, of &c., and S, his wife, who was wife of T T, late of &c., deceased, intestate, *in a plea of dower*, wherein the said R and S demand against the said D her reasonable or just third part of and in about two third parts of a dwellinghouse, situate &c., and in a piece of land under and adjoining thereto, being the whole of said dwellinghouse, excepting &c., which said two third parts of said house and land are in possession of E E, and said land is bounded &c.; whereof she is by law dowable of the endowment of the said T T, her late husband, according to the true intendment of law; and whereof she hath nothing as the demandants aver. And they further aver, that the said T T, the late husband of said S, was seized in his demesne, as of fee, of said two third parts of said dwellinghouse, and said piece of land during her coverture, and while she was his wife, and was in actual possession thereof; and that he died so seized thereof; and that the yearly value of said premises is, and ever since the decease of the said T T hath been, \$90; and that they, the said R R and S, at &c., on &c., did demand and request said D, *who then did and now does claim a right and inheritance in the premises aforesaid*, to assign and set out to her, the said S, her dower, or just third part of and in the same. And the demandants say, that since the time of making said demand, as aforesaid, more than one month hath elapsed; and the said D did not within one month next after said demand being made as aforesaid, assign and set out to said S her dower in said premises; and that he hath not done the same since; but he refused then and still refuses so to do; to the damage, &c.

WM. PRESCOTT.

Another form, more concise.

In a plea of dower, wherein they demand against the said

D her reasonable dower, in a certain parcel of land &c., bounded &c., whereof she hath nothing, as they say ; whereupon the said C C and B complain that one A A, late of &c., now deceased, formerly the husband of the said B, was seized in his demesne, as of fee, of the premises, during the coverture of the said B with the said A A, and that since the decease of the said A A, and for more than one year before the purchase of this writ, to wit, on &c., the said B demanded of the said D, *then and ever since tenant in possession, and having the immediate estate of freehold in the premises*, to assign and set out to her, her reasonable dower in the premises, which the said D hath altogether refused to do, but hath deforced and still deforceth the plaintiffs thereof ; to the damage of the said C C and B, &c.

By a widow for her Dower.

In a plea of dower, wherein the said demandant demands of the said B her dower, or just third part of and in a certain messuage, situate &c., and bounded &c., with the appurtenances, whereof the said demandant is by law dowable, according to the true intendment of law, as of the endowment of the said A A, her late husband ; and whereof she hath nothing, &c., and says, that she, the said demandant, at &c., on &c., being on the premises, did then and there demand her said dower thereof, as aforesaid ; yet the said D, who then was, and ever since hath been, and now is, tenant in possession of the said premises, and having the immediate estate of inheritance therein, although one month, since the demand was made, has long since past, has not assigned or set out her said dower, but wholly refuses so to do.

By a woman for her Dower, after divorce from her husband for adultery committed by him ; under statute of 1785, ch. 69, § 5.

To answer to B B of &c., single woman and spinster, and late the wife of the said A A, in a plea of dower, wherein she demands against the said D her reasonable dower in a certain dwellinghouse, with the lands &c., bounded &c. ; whereupon she complains and says, that the said A A, formerly her husband, was seized in his demesne, as of fee, of the premises, during the coverture of the said A A with her, the said B, and still continues so seized ; that she has been divorced from the bonds of matrimony with the said A A for the cause of adultery committed by him ; and that since the said divorce was had, and for a month before the purchase of this writ, to wit, on &c., she demanded of the

said D, then and ever since tenant in possession, and having the immediate estate of freehold in the premises, to assign and set out to her, her reasonable dower in the premises, which the said D refused to do, but hath deforced and still deforceth her thereof. T. PARSONS.

NOTE. Where a woman had received part of her dower of the same tenant and in the same town, at common law, she could not have a Writ of Dower *unde nihil habet*, because the words *whereof she hath nothing*, would have been untrue. She, therefore, was obliged to have recourse to her Writ of Right of Dower. But under our statute, there seems to be no necessity for this. If the words "whereof she hath nothing," are not true, there seems to be no necessity for inserting them, since a sufficient cause of action appears in the count without them, in the allegation of the demand and refusal to assign Dower. The Writ of Right of Dower contained no count, and was a mere demand of Dower, and was usually thus; *A B, who was the wife of B B, late of &c., deceased, by C C, her attorney, demands against the said D, the third part of one messuage &c., with the appurtenances, situate in &c., as the dower of her, the said A B, of the endowment of the said B, formerly her husband, &c.* Booth, 118; Rast. 2344. It is therefore apparent, that if the words, "whereof she has nothing," are omitted, the count will contain every thing necessary in a Writ of Right of Dower. It should be observed, that this form of a Writ of Right of Dower contains no allegation of a demand to have Dower assigned. A demand is made necessary by the statute, for the remedy is not provided until after demand, and the averment of it must of course be so, because the count should contain an averment of every thing necessary to maintain the action. If the count in Dower *unde nihil habet* should not contain an averment of a demand, and the defendant should not plead in abatement or in bar, it seems difficult to say how the demandant could obtain judgment, if the want of such allegation in the writ, were pointed out in the arrest of judgment. Certainly she could be entitled to no damages; for they are to be assessed from the time of demand only. In fact, if a demand is not alleged in the writ, there is no cause of action apparent in the declaration, under the statute. The action is brought prematurely, and the want of a demand is matter in bar, and not merely in abatement, for until the demand is made, the demandant is not entitled to this statute remedy.

LIBELS FOR DIVORCE.

FOR the causes for which a divorce from the bonds of Matrimony, will be decreed in Massachusetts, *see* Revised Statutes, chapter 76, section 5.

These causes are, adultery, impotency, being sentenced to the state prison, or any jail, or house of correction, for the term of seven years or more, &c.

By Section 6. A divorce from bed and board will be decreed for extreme cruelties, desertion, or a gross &c. neglect to furnish the necessities of life, being of ability so to do, &c.

By Sections 9, 10 and 11. No divorce shall be decreed for any cause, if the parties have never lived together as man and wife, within this state; nor for any cause which shall have occurred in any other state or country, unless the parties had previously lived together as husband and wife in this state; nor for any cause, which shall have occurred in any other state or country, unless one of the parties was then living within this state.

A libel must be signed by the libellant if of the age of legal consent to a marriage; otherwise by a guardian or by a next friend specially admitted by the court. Sec. 12.

The following decisions refer to the statutes in force previous to the Revised Statutes, but for the most part are grounded on analogous provisions.

Where a libel is for a divorce, *a vinculo*, a legal marriage must first be proved. A certificate of a magistrate is not evidence. 1 Mass. R. 240.

Where the charge is for adultery, confessions of the guilty party are inadmissible evidence. 2 Mass. R. 154.

Where the offence is committed in another state, and the libellant removes into this commonwealth afterwards, the libel will be dismissed. 3 Massachusetts Reports, 158. But if the parties dwell here before the commission of the crime, and the wrongdoer commits it out of the county, the libel will be sustained. *Ib.* So, if the libellant lives in this country and the respondent appears to have no settled residence, but the crime is committed out of the commonwealth, the libel will be sustained. *Squire v. Squire*, 3 Massachusetts Reports, 184. But if the marriage is solemnized and the act of adultery is committed in another state, and the libellant removes into this state, leaving the offender behind, the libel will not be sustained. *Carter v. Carter*, 6 Massachusetts Reports, 263.

If a person in this state removes into another for the purpose of obtaining a divorce, *a vinculo*, for a cause not sufficient within this state, the marriage is not dissolved thereby in this state. *Inhabitants of Hanover v. Turner*, 14 Mass. R. 227.

A libel must be signed by the libellant in person; a signing by attorney is not sufficient. *Willard v. Willard*, 4 Massachusetts Reports, 506.

The court will suffer a libel to be amended by inserting another act of adultery, and will grant a continuance to the respondent. *Tourtlot v. Tourtelot*, 4 Mass. R. 506.

Proof of a second marriage, is not such conclusive proof of cohabitation as will sustain a libel for a divorce. *Reemie v. Reemie*, 4 Mass. R. 586.

If the parties live together after notice of the commission of the crime, a divorce will not be decreed. *North v. North*, 5 Mass. R. 320.

In *Brown v. Brown, Ib.*, a witness being called to prove the charge, who was supposed to be *particeps criminis*, the Court said they would not refuse to swear him, but if he should testify that he knew the respondent to have committed the crime, they should inquire of him, with whom it was committed. *This was for the purpose of recommending to the solicitor-general, to lay the case before the grand jury.* But certainly, if the witness had been called, and testified that he knew the fact

to have been committed, he was under no obligation to criminate himself, nor could any confession, extorted from him under the apprehension of committing a contempt of court, if he declined to answer, be used against him with propriety, on an indictment against him for the crime. Suppose R knows that S has committed adultery with his wife, and he libels for a divorce, and summons S into court as a witness, and S, being sworn on the stand, is asked what he knows on the subject of the libel, and in the course of the examination, states, that he knows that on such a day, and at such a place, the woman committed the crime; to all the various questions, how he knows it? Who was the *particeps criminis*? Was any body else present? Who else was present? &c., &c., he may give the general answer, that he is not bound to answer the question; and if asked, as perhaps he may be, though without much regard to legal principle, whether he himself is the person, he may, in like manner, decline to answer; but if he says that he is not the person, then, it will certainly be contempt of court to decline answering those questions. But, as the law will never place a witness in a dilemma, where he must either commit perjury, or criminate himself, it cannot be considered a contempt of court, to decline answering any question, a direct answer to which, will lay him under such a necessity.

Of the Libel.

The allegation of the crime of adultery in a libel should be sufficiently certain to apprise the respondent of what is to be answered. A mere general allegation, without time or place, of having committed the crime of adultery, and having deserted the libelant, is too loose. *Church v. Church*, 3 Mass. R. 157. The reason of which seems to be, that however innocent the respondent may be, it will be impossible for him to prepare himself to rebut the charge with witnesses, unless some particular instances are alleged. The libel, however, may be amended, and a continuance granted to the respondent. *Ibid.*

Where the names of the persons, with whom the adultery is supposed to have been committed, are known, it is said they should be named, in order that the Attorney General may prosecute the offenders; and if they are not known, there must be an averment to that effect in the libel. *Church v. Church*, 3 Mass. Rep. 157; *Choate v. Choate*, 3 Mass. R. 391. *Quære* of the propriety or necessity of this, since it seems so inconsistent with decency and fairness thus, to introduce on the records, in a shameful and scandalous manner, the names of third persons, that nothing can be said to warrant it; unless, in fact, there is a necessary presumption that such persons are guilty of the crime, or that otherwise they never would be so introduced. But since there is no crime so great, but that some have been acquitted of it, it follows, if any respect is given to the verdicts of juries, that there are no crimes so great, but men may be accused of them, and yet be innocent. There is then no right to presume, that a person, named as *particeps criminis* in a libel, is guilty. The injustice and cruelty of naming a third person in a libel for adultery, as *particeps criminis*, lie here; that such third persons may have their names handed down, and perpetuated on the records of the state, from generation to genera-

tion, with the stigma of an infamous crime attached to them, without having had notice, and without any opportunity of being heard or showing their innocence. Let a case be supposed, and as the law is no respecter of persons, a strong one may be put without any very great improbability. Let it be supposed that a married woman is jealous of her husband, and that she has suspicions of some female of her acquaintance, perhaps a respectable married woman. Suppose she thinks she has the support of strong circumstances, to believe that her husband has committed the crime with this woman, but which, when explained away, are perfectly compatible with innocence. Suppose she libels for divorce, for adultery committed with this woman, and another. Suppose the criminality of the husband with the other woman is conclusively proved, on another specification in the same libel. Now, is it to be tolerated, that the records shall appear in the manner they undoubtedly would in such case, if the libellant must name the *particeps criminis*, when known. For the libel is against A, for the crime of adultery, committed with B, and also with C. With C it is proved by the evidence of witnesses. Against B, when explained, there appears to be no foundation for the charge. Now the decree of the Court will be, that the allegations of the libel are supported, and therefore a divorce is decreed; the consequence of which is, that two persons, one innocent and the other guilty, are consigned to infamy for disgraceful crimes, without an opportunity of being heard. This is in the highest degree unjust. For, if they are named in the libel as guilty of a crime, and evidence is received, to show that they are so, then they ought to be made parties, and notice should be given them. For, it may very well be, that the husband may be innocent, as respects these persons, and yet be unable to prove it, or, he may have been proved guilty with others, and therefore may be indifferent about showing the innocence of himself and the person really innocent, and yet such innocent person may be able, by proving an alibi, to show conclusively her innocence, but is not permitted, or what may amount frequently to the same thing, receives no notice of the transaction until too late. There is another view of the subject, that shows the extreme impropriety and unreasonableness of this practice. The law gives a person, whose husband commits adultery, a right, on proof of the charge, of being divorced. Justice to the offending party requires merely a distinct specification of the charge, so that he may know what to answer. This may be done by alleging a time and place alone, and suffering the libellant to prove an act of criminality, at no other times or places than are specified in the libel. There is no necessity of naming the *particeps criminis* on the record. If it comes out on the trial, who that person is, it is comparatively of little consequence, as it is not recorded, and as it is much more unlikely, that a charge should come out from a witness against an individual who was innocent, than that a person charged in the libel, should be so, against whom no witness may dare to appear. But the law, thus giving a right of divorce to an injured party, should be put in force, like other laws. The Court ought to throw no obstructions in the way to hinder the obtaining of a divorce, where the party is entitled to it. But if he is obliged to name the *particeps criminis* in the libel, he must seek redress at a very great peril. What can be a more infamous libel or slander of a woman, whether married or single, than to charge her, as *particeps criminis* with an adulterer, in a libel for a divorce? And yet the libellant must run the risk of committing this offence, in en-

deavoring to obtain redress for the crime committed against herself. And suppose it turns out, that she cannot substantiate the charge against the woman named. What may not, in the mean time, have been the disastrous consequences to her character and prospects in life. It may have been done in her absence, when she knew nothing of it. Suppose she brings her action for a libel, against the libelant for a divorce, what plea can she have? She could only plead, not guilty, and show probable cause, *and the necessity she was under of complying with the rule of the court*, in naming the plaintiff, as *particeps criminis*, with her husband, in the libel for a divorce. That she had no particular malice would probably be inferred from her proving the charge of adultery against her husband, with another person, and thereby obtaining a divorce; and perhaps she might thus avoid vindictive *general damages*; but how is she to get rid of *special damages*, which may be alleged and proved in such a case to a ruinous extent, and for which the plaintiff will be entitled to recover to the utmost farthing. To write a mere letter, charging a respectable woman with unchastity, would be sufficient to warrant a jury in giving the most exemplary damages, without any proof of special injury. How much more so to put such a charge on the records of the courts, which are to remain for centuries, thus leaving an indelible stigma on the woman herself, and a stain on all her family?

Of service and notice.

The manner of serving notice of the libel is precisely pointed out in the Revised Statutes, chapter 76, sections 13, 14, 15, 16 and 17. The following decisions are under the provisions of the former statutes.

The libel must be filed in the clerk's office, and must be served on the defendant fourteen days before the sitting of the court, by personal notice, unless the defendant is out of the commonwealth, in which case newspaper notice is sufficient. *Hopkins v. Hopkins*, 3 Massachusetts Reports, 159.

When the respondent is not resident within the State, it is not necessary to file the libel in the clerk's office, but it should be so stated in the libel, or the court cannot dispense with personal notice. *Choate v. Choate*, 3 Mass. R. 392.

The libel must be filed fourteen days before the first sitting of the court; to file it fourteen days before an adjourned sitting, is not sufficient. 5 Mass. R. 197.

The personal notice must be in writing, that is, a copy of the libel and summons; reading is not sufficient. *Smith v. Manning, Ex'r.* 9 Mass. R. 422.

If the respondent is absent at sea, and expected to return, the court will not proceed upon a notice in a newspaper. *Mace v. Mace*, 7 Mass. R. 212.

If the respondent is not within the county at the time of service, nor at any time after, the court will not proceed on notice left at the last and usual place of abode; actual notice must be proved where practicable. *Randall v. Randall*, 7 Mass. R. 502.

Where husband becomes insane after the fact charged against him in the libel, the court will not proceed until a guardian is appointed to him. *Mansfield v. Mansfield*, 13 Mass. R. 412.

Where a husband procures or connives at an adulterous act, a divorce will not be granted. *Pierce v. Pierce*, 3 Pick. 299.

Divorce a mensa et thoro.

Under the statute 1785, ch. 119, to sustain a libel for a divorce on the ground of *extreme cruelty*, personal violence must be proved. And therefore desertion of a wife for eight years, and leaving her with a large family of children to suffer great privations, is not sufficient. *Warren v. Warren*, 3 Mass. R. 321.

A libel may contain a charge of extreme cruelty, as well as a charge for adultery, and the court will decree as seems just and lawful. *Young v. Young*, 4 Mass. R. 430.

Unprovoked personal violence is sufficient evidence of extreme cruelty, to sustain the libel. *French v. French*, 4 Mass. R. 587.

Living together after the violence was committed, it is said, will be no objection to granting a divorce, *a mensa et thoro*. 6 Mass. R. 69. This, however, must depend upon the length of time; it is presumed that if the parties have lived together two or three years in harmony, after an assault and battery, however unprovoked, the court will hardly decree a divorce for that act though it might have been sufficient at first.

Under statute 1810, ch. 119, a wife may be divorced *a mensa et thoro*, either, 1. Whenever her husband utterly deserts her; 2. Whenever he grossly, or wantonly and cruelly, neglects or refuses to provide suitable maintenance for her, being of sufficient ability thereto. And the court have the same authority in this case as in other cases of divorce *a mensa et thoro*. Further act, 1820, ch. 56.

Libel for divorce for adultery.

*To the Honorable the Justices of the Supreme Judicial Court
next to be holden at &c., within and for the county of &c.
on &c.*

A B of &c., wife of C B, of &c., respectfully libels and gives this honorable court to be informed; that she was lawfully married to the said C B, at &c., on &c., and has had by him four children who are now living, viz. K B, L B, M B, and N B; that your libelant since their intermarriage has always behaved herself as a faithful, chaste, and affectionate wife towards the said C B; but that the said C B, wholly regardless of his marriage covenant and duty, on divers days and times since the said intermarriage, viz. on &c., &c., has committed the crime of adultery with divers lewd women, viz. with one M R, one N R, and one R P, all of &c., and with divers other lewd women whose names are to your libelant unknown; that the said C B and the said A B, in her right, hold in fee simple, real estate of the value of \$—, within this commonwealth; that by reason of the said marriage, the said C B has received personal estate to the value of \$—; that the said C B is seized in fee in his own right of a valuable real estate, situate within this commonwealth, and owns and has a large and valuable per-

sonal estate, to wit, of the value of \$—, besides the personal estate which he received by reason of said marriage ; wherefore the said libelant prays right and justice, and that she may be divorced from the bonds of matrimony, between her and her said husband ; that all the personal estate, which he received by reason of said marriage, as aforesaid, or a sum of money equal in value to the whole of the same personal estate, may be assigned to her, for her own use, and that the custody and education of two of the said children, *viz.* M B and N B, on account of their tender years, may be committed and intrusted to her ; and as in duty bound will ever pray, &c.

Another ; more brief.

A D, wife of C D, of &c., libels and gives this honorable court to be informed, that on &c., at &c., she was lawfully married to the said C D, and hath always behaved towards him as a chaste and faithful wife ; yet the said C D, neglecting his marriage vows and duty, since the said marriage, on &c., at &c., committed the crime of adultery with a certain lewd woman, to your libelant unknown. That the said C D has a personal estate of the value of \$—, which he received by reason of the said marriage, as well as other personal estate of the value of \$— ; wherefore your libelant prays that the bonds of matrimony may be dissolved between herself and the said C D ; that the value of said personal estate, which the said C D received on account of the said marriage may be restored to her ; and that such further provision should be made for her, out of the estate of the said C D, as this honorable court may consider just, &c.

Joint Libel for mariners' wages.

To the Honorable J. D. Esq., Judge of the District Court in and for the District of Massachusetts.

E B, J C, J L, and J S, all of &c., in the district aforesaid, seamen, libel, propound, and give the court to understand, that they shipped on board the ship Friendship, of &c. W S, of &c. in said district, mariner, commander, at the following times and places, to wit, the said B on &c., at &c.; the said C, at &c., on &c., last ; the said L, on &c., at &c., and the said S, on &c., at &c., to proceed on a voyage from &c. to &c. in said district of Massachusetts, where the said voyage was to be complete and ended, as seamen, at the

following rate of wages, to wit, the said B at \$12 per month, the said C at \$10 per month, the said L at \$20 per month, and the said S at \$10 per month. And your libelants aver, that the said ship arrived at &c. aforesaid, her port of discharge, in safety, on &c., that they have each performed their several duties on board said ship during the whole of said voyage, and were there severally discharged therefrom, to wit, on &c.; and that there is due and unpaid to your libelants, for their wages on board of said ship during said last voyage, the following sums, to wit, to said B the sum of \$108, to said C \$90, to said L \$360, and to said S \$100, which said master has refused and still refuses and neglects to pay. Wherefore your libelants humbly represent, that ten days having elapsed since said discharge, and that a dispute having arisen between the said master and them touching said wages; they therefore pray your honor to summon said W S, the master of said ship, to appear before your honor, to show cause why admiralty process should not issue against said ship, her tackle, apparel, and furniture, according to the course of admiralty courts, to answer for said wages; and as in duty bound will ever pray. W. T. *Attorney to Libelants.*

NOTE. To the foregoing libel the following plea was pleaded.

At a District Court holden at &c. within and for the same district, on &c., before the Hon. J. D. Esq., Judge of the same court.

And now A W and J P of S, in the same district, merchants, come into court, and in answer to the libel of E B, J C, J L, and J S, against the ship *Friendship*, humbly propound and show to the said judge the following articles.

1. That they, the said W and P, were the sole owners of the ship during the said voyage, and now are the sole owners thereof, and that the said W S was during the said voyage commander thereof.

2. That the said B shipped as a seaman on board said ship, on the third day of &c. last, for the monthly wages of \$12, and has received one month's advance wages, and \$1.78 hospital money; that the said C shipped as a seaman on board the said ship, on the twenty-second day of &c. last, for the monthly wages of \$10, and has received one month's advance wages, and \$1.78 hospital money; that the said S shipped as a seaman on board said ship, on the third day &c. last, for the monthly wages of \$10, and has received one month's advance wages and \$1.78 hospital money; that the said L shipped as a seaman on board said ship, on the fifteenth day of &c., in the year &c., for the monthly wages of \$12, and has received \$41.07, including \$3.07 hospital money; and that the said seamen were discharged from the said ship on the thirtieth day of &c. last.

3. That, during the said voyage, and while the said seamen were on board, together with thirteen other seamen belonging to the said ship, whose names are W W, C V, J P, C H, J L, J T, J W, P R, J S, T T,

F W, J O, and N A, there were embezzled by the said crew, or by some of them, who are unknown, or by others unknown, by the negligence of the said crew, a part of the cargo of the said ship, to wit, ten bales of brown nankins of the value of \$900, ninety pieces of brown nankins of the value of \$81, and one bale of blue nankins of the value of \$125, amounting in the whole to \$1106, which the said seventeen seamen are accountable for and bound to pay for, and have the same deducted from their wages unless they or some one or more of them, will discover the person or persons, who in fact embezzled the same nankins, without any negligence on the part of the crew. Wherefore the respondents pray, that one seventeenth part of the value of said nankins, being \$65.06, may be deducted from the wages of each of the said libelants, and that the residue of their wages after the said deduction, the said respondents always have been, since the end of the said voyage, and now are ready to pay; and thereupon the said respondents pray that upon the payment of the said residue respectively, the said libel may be dismissed with costs.

A. W., J. P.
THEOPH. PARSONS.

PARTITION AT COMMON LAW.

By joint tenants.

In a plea of partition; for that the said R, and H, his wife, in her right, B, and L, in her right, and T D, hold together one undivided tract of land &c., of which it appertains to the plaintiffs [*naming them*] to hold five ninths, and the said T D [defendant,] the other four ninths, which they may severally hold; but the said T D denies to make partition thereof between him and the plaintiffs, and will not permit the same to be done, against the law in such case made and provided; whereof the plaintiffs, in manner aforesaid, bring this suit, &c. See *Cro. Eliz.* 64.

By parceners.

In a plea of partition; for that the said T and S [defendants,] and M [plaintiff] hold in common and undivided, a certain messuage &c., as of the inheritance, which was of R, deceased, grandfather of the said T, S, and M, whose heirs they are, after the death of C, deceased, father of the plaintiffs, and son of the said R, to whom the said R devised the same messuage &c., to hold as an *estate for life*; whereupon, by law and by right, it appertains to the said T, to hold to himself, in severalty, one third part thereof; to the said S, to hold &c. one third part thereof; and to the said M, to hold &c. another third part thereof; so that the said T, S, and M, may separately hold, possess, and enjoy their

said respective third parts in severalty; nevertheless, the said T and S, though often requested, unjustly refuse to make partition of the said messuage &c., according to the law and custom of this commonwealth, and will not permit the same to be made.

By tenants in common.

In a plea of partition; for that the plaintiff and the said B hold together a certain undivided piece of land &c., whereof it appertains to the plaintiff, and his heirs, to have a sixth part, and to the said B to have the residue, in proportion and manner, and of such estate, to the plaintiff unknown, to hold to them in severalty; so that the plaintiff and said B, their several parts aforesaid, of the premises aforesaid, may severally appropriate to themselves; yet the said B unjustly refuses to make partition thereof between them, and will not suffer the same to be done, according to the law in that case, &c.

The same, by baron and feme.

In a plea of partition; for that the said B, and C in her right, and the said D [defendant,] hold together, in common and undivided, a certain tract of land &c. whereof it appertains to the said B and C, and her heirs, to have one moiety of said land &c., in severalty, and to the said D and his heirs, to have the other moiety thereof, with the appurtenances, in severalty; so that the said B and C, and the said D, their several parts aforesaid, may severally to themselves appropriate; but the said D, though often requested, will not make partition thereof, in form aforesaid, nor suffer the same to be made; to the damage &c.

TROWBRIDGE.

Petition for partition.

Humbly shews A B, of &c., and C D, of &c., that they are seized *in fee simple*, and as tenants in common, of and in a certain real estate &c. [description,] the said A B of one undivided ninth part, and the said C D of one undivided tenth part, with E F and certain other persons unknown to your petitioners; that they cannot possess, occupy and improve the said parts to any advantage, while the same lie in common and undivided as aforesaid, but wholly lose the profits thereof; wherefore they pray that notice may be issued, in due form of law; and that their said parts may be set off and assigned to them, in severalty; and your petitioners shall ever pray.

SUMMONS TO WARRANTORS, VOUCHES, &c.

Summons to warrantor.

Whereas W S, of &c., and his wife, in her right, did sue out of the clerk's office of our Court of C. P., for our said county of &c., a writ of original summons against C P, of &c., which writ was returnable into our Court of C. P., to be holden at &c., within &c., on &c.; and therein and thereby did demand against the said C P, the possession of &c. At which same court the said C P appeared by his attorney; and on motion to the justices of the said court, wherein the said C P suggested, that he claimed the said real estate by descent from his father, E P, Esq., deceased, to whom one I Q, late of &c., conveyed the same, and prayed our said Justices, that the said action should be continued to our Court of C. P., next to be holden at &c., within &c., on &c., that the heirs at law of said I Q might be notified of such suit, then pending, and take the defence thereof upon them, if they see fit; which was, by the said justices, then and there granted. We command you, therefore, that you summon and give notice unto the heirs at law of the said I Q, to wit, [naming them,] if they may be found in your precinct, of the said suit, pending as aforesaid between the said S and wife, against the said C P, and that they appear at our Court of C P, next to be holden at &c., on &c., as aforesaid (if they see fit,) to take the defence of the said suit upon them. And of this writ, and your doings therein, you are to make true return into our said court, next to be holden, &c. Witness, &c.

PULLING.

Summons and voucher to executors of warrantor, by warrantees and assignees of warrantees.

Whereas R, of &c., and H of &c., did sue out of the clerk's office of our Court of C. P. for said county of &c. an original summons against N and P [defendants,] which writ was returnable into our said Court of C P, holden at &c., on &c.; and therein and thereby did demand against the said &c., [defendants,] certain tracts of land &c., in a plea of land, wherein the plaintiffs demand &c. [as in the declaration.] At which court the said &c. [defendants] appeared, and severally said, that S G in his lifetime, by his deed of bargain and sale, dated &c., conveyed — acres of

said land to one X, and *his heirs and assigns, with warranty*. And the said X, afterwards, by his deed of bargain and sale, conveyed the said — acres to the said N [defendant] and his heirs; by virtue of which said last mentioned deed, the said N now holds the said land. And the said S G, by his other deed of bargain and sale, dated &c., conveyed — acres more of said land to said N, his heirs and assigns, *with warranty*; by virtue of which he now holds it.

And that the said S G, in his lifetime, by his other deed of bargain and sale, dated &c., conveyed — acres more of said tracts of land to one I C, his heirs and assigns, *with warranty*. And the said I C, by his deed of bargain and sale, conveyed the said — acres to the said P [defendant], and his heirs and assigns; by virtue of which he now holds it.

And at which court the said N and P prayed the justices of said court, that said action should be continued to the Court of C. P., next to be holden at &c., on &c.; that H and O, executors of the last will and testament of said S G, the aforesaid warrantor, might be notified of such suit pending, and take upon themselves the defence thereof; which was granted by the said court. We command you, therefore, &c. [*as in the preceding form.*]

Summons and severance.

Summon A B, and C, his wife, together with I K, of &c., and L, his wife, in her right, O, P, and Q, spinsters and infants, who sue by said A B, their next friend; to pursue, if they see cause, an action of ejectment against W &c., begun and prosecuted at our inferior Court &c., held at &c., on &c., by the said &c.; as they, the said &c. are co-heirs of one M N, late of &c.; wherein they demand against said W their right, as co-heirs as aforesaid, to a certain tract of land, situate &c. And have you there this writ &c. *Rast.* 351, 356. CHIPMAN.

BILLS IN EQUITY.

Assignee of mortgagor v. Assignee of mortgagee.

Complains I, of &c., that one S, of &c., was on &c., seized in fee of a certain piece or parcel of land, situate

&c.; and being so seized thereof, did then and there, by his deed of bargain and sale of that date, duly executed &c., convey the aforesaid parcel of land to one N, of &c., to have and to hold the same to him, his heirs and assigns, upon the condition, *viz.* that if &c., then the above written and foregoing deed to be void. And afterwards, on &c., the said N, by his deed of that date, for a valuable consideration &c., did bargain, sell, transfer, assign, and set over to F, of &c., [respondent,] the above described parcel of land &c. to have and to hold the same to him the said F, his heirs and assigns forever. And afterwards, on &c., the said S, being in actual possession of the premises, by his deed &c., here in court to be produced, conveyed &c. to I [plaintiff] to have and to hold to him, his heirs and assigns; subject to the aforesaid conveyance, in mortgage thereof, to the said N, and upon said condition also, to wit, that if &c.; and that afterwards, on &c., the said I, being then in possession of the said premises, the said S, not having paid at that time any part of the principal sum of money mentioned in the condition of his deed of mortgage, or in any way discharged or performed the same condition, did then and there, by his deed &c., here in court to be produced, for a valuable consideration therein expressed, remise, release &c. to said I, his heirs and assigns forever, all his right &c., to have and to hold the same to the said I, his heirs &c.; by force of all which, the said I, became seized of the right in equity to redeem said piece of land, and entitled to, and had a right to redeem the same, by paying to said F, to whom said mortgaged premises, and the sums of money, mentioned in the condition of said deed of mortgage from said S to said N, were bargained, sold, and assigned as aforesaid, all the sums of money mentioned in said deed of mortgage from said S to said N, and lawful interest, and all damages and costs that had happened or accrued to said N or F, or either of them, by reason of said debts or demands, and of their not having been sooner paid by said S; all which the said F well knew, and thereof, afterwards, on &c., at &c., had notice. And the said I, at &c., afterwards, on &c., in order to redeem said piece of land with the appurtenances, from said F, tendered to him, being then and there in possession of said premises, and holding the same in his own right, by virtue and force of said deed from said N, to him, the said F, as aforesaid, the aforesaid sums of \$—, principal money mentioned in the condition of said deed of said S to said

N, and the further sum of \$— for the interest of said principal money that was then, or might be due to him, the said F, as aforesaid, after deducting the rents and profits of said land, which he had received, over and above any repairs and improvements made by him or said N, of or upon the premises; and to satisfy and to pay him for all costs that had arisen [*as in the condition*] or accrued to said F by reason of said sums not having been sooner paid or discharged; the aforesaid sums so tendered being \$—; and then and there requested him, the said F, to accept the same and to deliver him possession of said piece of land, and to seal, execute and acknowledge a deed of release and quitclaim thereof, to him, the said I; but he refused to accept the same money, or deliver possession of said land to him, the said I, or execute any deed of release or quitclaim thereof, and wholly denies the right of redemption of the same to him, the said I, and continues to hold him out of the same; to the damage of him, the said I, as he saith, the sum of \$—; whereupon he brings this suit, and humbly prays your honors to consider the matter in equity; and producing and lodging here in court, the said sum of money for said F, for him to take such part thereof as may be found to be due, he, the said I, prays to be restored both to the title and possession of the piece or parcel of land aforesaid, and to be allowed his costs. Signed, &c. *Swinerton, jun. v. Fuller.* W. PRESCOTT.

NOTE. This bill was brought on the old act of 1698. See the late Statutes on the subject.

Trust mortgagor v. Administrator and heirs of mortgagee and trustee.

We command you that you summon A, of &c., administrator of the goods and estate of M C, late of &c., deceased, intestate, B, C, &c., being the heirs at law of the said M and F, of &c., to answer to W, of &c., in a case in equity; wherein the said W complains and says, that the said F, on &c., at &c., bid off and purchased for the said W, at his request, the following parcels of land and dwelling-house, viz. &c. which said parcels of land and dwelling-house were then and there sold at public vendue, for the sum of \$—, which said sum was then paid therefor; and thereupon, afterwards, on &c., the same parcels of land and house were conveyed to the said F, to hold in trust for the said W, who had paid the whole consideration therefor, as aforesaid. And afterwards, on the same — day of &c.,

the said F, being seized of, and holding said parcels of land and said dwellinghouse in trust for said W, then and there, by his direction and appointment, by his, the said F's, deed of bargain and sale, of that date, by him signed, sealed, and delivered, and duly acknowledged, conveyed in mortgage the said parcels of land, and said buildings, to the said M C, then living, as collateral security for the payment of the sum of \$—, and lawful interest therefor, which sum the said M C had, on that same day, loaned to the said W for one year then next ensuing, and now past. And the said M C then and there, by her deed of that date, by her signed, sealed, and delivered, and here in court to be produced, acknowledged and agreed, that she had a deed of said F of the parcels of land and buildings aforesaid, for security for the sum of \$—, that she paid to the said W (meaning, he avers, the said \$—, which she had loaned to the said W as aforesaid;) and that if the said W, his heirs or assigns should pay said sum of \$—, and the interest therefor, at or before &c., then next ensuing, then she would convey unto him the said parcels of land and buildings again; but in case the said W did not pay the aforesaid sum of money and interest to her, at or before said — day of &c., then the same land and buildings were not to be conveyed to him, but to be held by her, as by said F's deed was expressed. And she did therein covenant and agree with said W, that if he should well and truly pay the said sum of \$—, and interest, she would thereupon *return* him said land.

And the said W says, that the said M C, at the time the said F made and delivered his aforesaid deed to her, as aforesaid, occupied the said house, and part of the land aforesaid, as tenant to the said W; and that she, from that time until her death, which happened on &c. last past, continued to occupy said house, and part of said land as tenant to said W, and that he occupied the other part of said land; and that since the decease of the said M C, the said A, as administrator of her goods and estate, hath entered into said house and land, for and because the condition aforementioned, to be performed by said W, was broken, and hath continued possession unto this time.

And the said W further says, that afterwards, on &c. last past, at &c., he, in order to redeem said house and parcels of land, tendered and offered to said A, administrator of the goods and estate of said M C as aforesaid, the sum of \$—, for the payment of the said sum of \$—, due from him to

said A, as administrator as aforesaid, and to secure the payment whereof, said house and parcels of land were conveyed to the said M C as aforesaid, and the lawful interest thereof then due, and all costs which said M C, in her lifetime, and the said A, since her decease, had incurred about or respecting said house and parcels of land, and of all sums of money which he had disbursed and expended in necessary repairs, over and above what the rents and profits thereof amounted to, upon a just computation; and then and there requested him to accept the same, and to deliver possession of the premises to him, and to discharge the said mortgage thereof, by release, quitclaim, or some other legal conveyance. And the said W avers, that the said sum of \$—, so by him tendered to said A, did then and there exceed the whole principal money, which said house and parcels of land were conveyed to secure the payment of, as aforesaid, and all the interest then due thereon, and all costs which had been incurred by the said M C and said A on account of said house and parcels of land, or debt, together with all sums of money disbursed and expended by said M, in her lifetime, or the said A, or her aforesaid heirs at law, or any of them, since her decease, in repairing the fences or buildings on said lands, and advancing and bettering said premises, over and above what the rents and profits thereof, received by her, in her lifetime, and the said A, and her said heirs at law, after her decease, did amount to, upon a just computation; and yet the said A, administrator as aforesaid, wholly denies, and the said B, C, &c., the heirs at law of said M C, deceased, wholly deny, and the said F also doth deny the right of redemption of said premises to him, the said W; and they continue to hold him out of the same; to the damage of him, the said W, as he says, the sum of \$3000; wherefore he brings this suit, and prays your honors to consider his case in equity, and that, upon his producing and lodging in Court all such sums of money as your honors shall find to be due to the said A, in his said capacity, he may be restored to the title and possession of the dwellinghouse and parcels of land, and other buildings aforesaid. *Wiltridge v. Cross et al. S. J. C., Essex, Nov. Term, 1800.* W. PRESCOTT.

Mortgagor v. Mortgagee, to redeem.

In a case in equity, wherein the said R complains and says, that on &c., being seized in his demesne, as of fee, of a dwellinghouse, parcel of land, and other buildings thereon, situate

&c., bounded, &c., he then, at S aforesaid, by his deed of bargain and sale, of that date, by him duly executed and acknowledged, did bargain, sell and convey in mortgage to the said D [defendant] the said premises, to have and to hold the same to her, and her heirs and assigns forever, upon this condition, that if the said R, his heirs, executors, administrators or assigns, should pay to the said D, or her executors, administrators or assigns, the sum of \$—, with lawful interest therefor, in one year from the said date thereof, now past, according to the condition of his bond given her that same day, then that deed, as well as said bond, to be void. And the said R saith, that she there, on &c., entered into the said house and land, for and because the aforesaid condition of his said deed was broken, and hath continued possession thereof to this day; and that he afterwards, on &c., in order to redeem said house and land, tendered and offered to said D the sum of &c., for the payment of the sum then due from him to her, upon and by virtue of said bond, for securing the payment of which, said house and land were conveyed in mortgage to said D as aforesaid, and all costs which she had incurred about or respecting said house and land, and of all sums of money which she had disbursed and expended in necessary repairs, over and above what the rents and profits thereof amounted to, upon a just computation; and then and there requested her to accept the same, and to deliver possession of the premises to him, and to discharge the said mortgage thereof, by release, quitclaim, or some other legal conveyance. And the said R says, that the said sum of &c., so by him tendered to the said D, did then and there exceed the whole principal and interest then due on and by virtue of said bond, and which said house and land were conveyed to her, to secure the payment of as aforesaid, and all costs which had been incurred by her, on account of said house and land, and debt, together with all sums of money disbursed and expended by said D in repairing said house, and the buildings and fences on said land, and advancing and bettering said premises, over and above what the rents and profits thereof, received by her, did then amount to, upon a just computation; and yet she wholly denies the right of redemption of said premises to him, the said R; and she continues to hold him out of the same, to his damage, as he says, \$2000; wherefore he brings this suit, and prays your honors to consider his case in equity, and that, upon his producing and lodging in

court all such sums of money as your honors shall find to be due to the said D, he may be restored to the title and possession of his dwellinghouse and land aforesaid. *Whittemore v. Very, Nov. Term, 1801. See the late statutes.*

W. PRESCOTT.

NOTE. Where there is a mortgage conditioned for the payment of several sums of money, at several times, and the mortgagee enters for the first default of payment, in order to foreclose, the mortgagor, can only redeem by paying or tendering the whole amount due on the mortgage, and not merely the amount of the sum, for the non-payment of which the entry was made. *Mann v. Richardson, 21 Pick. 355.*

If the whole sum is not due, the court, upon payment of so much as is due, will make a special decree, leaving the mortgagee in possession, until the further sum shall become due. *Ibid. See 5 Pick. 259.*

But suppose a mortgage to be given for \$1000 to be paid Jan. 1, 1840, and for the sum of \$1000 to be paid Jan. 1, 1847, and on default of payment of the first sum the mortgagee enters to foreclose, is it to be understood that the mortgagor, in order to redeem in 1842, must tender the sum of \$1000 to become due in 1847, as well as the sum due in 1840? No, he tenders the first sum, and the mortgagee, after accepting it, is entitled to retain possession, at common law, until the second breach (*viz.* in 1847) takes place. After the second breach, he ought to give notice, that he shall hold possession for the purpose of foreclosing, and the foreclosure will then take place at the expiration of three years from the time of that notice.

SCIRE FACIAS.

Scire Facias on the Absconding Act, 1738, ch. 16, sec. 4.

WHEREAS L and S, by the consideration of our Court of C. P., holden at &c., on &c., recovered judgment for the sum of \$— damages, and costs of suit, taxed at \$—, against the goods and effects of F A [an absconding and absent debtor] in the hands of M, as agent and trustee of said F. And whereas said L and S afterwards, at &c., on &c., purchased out of the clerk's office of our said court, our writ of execution upon that judgment, in due form of law, returnable into said court then next to be holden at &c., directed to the sheriff &c., commanding him to serve, execute, and return the same, according to the precept thereof. And whereas the said writ of execution was afterwards, at &c., on the same day, delivered to one Y, then and ever since one of our deputy-sheriffs for said county of &c., who thereafter on the same day, required the said M to discover, expose, and subject the goods, effects, and credits of the

said F, in his hands, to be taken in execution for the satisfaction of the said judgment, which the said M then and there refused to do; whereupon the said Y returned the said execution into our Court of C. P., holden at &c., on &c., and returned thereon, that he had made diligent search after the goods, chattels, rights, and credits of the said F, whereon to levy the said execution, and could not find in his precinct, nor in the hands of said M, nor would the said M show or disclose any to him, whereon to levy the said execution; by means of all which, the said L and S are in danger of losing all benefit from said judgment, so recovered as aforesaid; and having supplicated us to grant a remedy in that behalf; willing therefore that justice be done to all our citizens, we command you that you make known to the said M, if he may be found in your precinct, that he appear before our justices of our Court of C. P. &c., to answer to the said L and S, and show cause, if any he hath, why judgment should not be entered up against him, for the said sum, as of his own proper goods and estate, and execution be thereupon awarded accordingly. And have you there this writ, &c. Witness, &c. PARSONS.

NOTE. The part between crotchets may be omitted under the Trustee Act.

Scire facias, by administrator de bonis non v. Executor for waste.

Whereas F, of &c., as administrator of the goods, chattels, rights, and credits of S, late of &c., not administered upon by R, former administrator thereon, before the justices of our Court of C. P., holden on &c., at &c., by the consideration of said justices, recovered judgment against the goods and estate of D, late of &c., testate, in the hands of H, as he was executor of the last will and testament of the said D, for the sum of \$— damages, and also \$— for costs and charges, by him about his suit in that behalf expended, as to us appears of record; and although judgment thereof be rendered as aforesaid, yet execution of the said damages and costs doth yet remain to be made. And the said F, in his said capacity, on &c., sued out his writ of execution, in due form of law, on the same judgment, against the goods and estate of the said D in the hands of the said H, returnable into the clerk's office of the said court, within three months then next ensuing; and delivered the same on the same day, at &c., to be duly served, to W, then and ever since one of the constables of the said town of &c., and

who there, on &c., made return accordingly of the same writ of execution, into the said office, in the words and figures following, viz. "Essex B—, January 15, 1795. By virtue of this precept, I have made diligent search and inquiry, and cannot find any goods or estate of the said D, the testator within named. And so I return this execution in no part satisfied;" and signed the same with his, the said W's, christian and surname, and the addition of his said office. And the said F, the said administrator, thereupon hath made suggestion to us, that the said H hath wasted the goods and estate of the said D, the testator; whereof the said F, the said administrator, hath made application to us to provide a remedy for him in that behalf. Now, to the end that justice be done, we command you that you make known unto the said H, that he be before our justices of our said Court of C. P., to be holden at &c., on &c., to show cause, if any he has, wherefore the said F ought not, in said capacity, to have his execution against him, the said H, for his damages and costs aforesaid; and further to do and receive what our said court shall then and there consider. And then and there have you this writ, with your doings therein. Hereof fail not. Witness, &c. DANE.

NOTE. A Scire Facias is a judicial writ and must pursue the nature of the judgment. Therefore, when the judgment is against two, Scire Facias must be so also. 2 Salk. 598.

Scire facias against administrator, on suggestion of waste. [Concise form.]

Whereas R, of &c., before our justices &c., by the consideration of our said justices, recovered judgment against the estate of G, late of &c., in the hands and under the administration of S, of &c., administrator &c., for the sum of \$—, for costs and charges &c.; and although judgment be thereof rendered, and execution accordingly granted thereon, yet the same is returned by N, then and ever since a deputy-sheriff of &c., that he had made diligent inquiry for the estate of the said G, in the hands of the said S, but could find no estate in his hands to satisfy the said execution; and so he returned the same in no part satisfied. And whereas the said R, by his petition to our inferior court &c., held &c., suggested that the said S had wasted the said estate of the said G, to the value of the sums aforesaid, and sufficient to satisfy the same, and prayed that a writ of scire facias might issue against him to show cause, if any he have, why

execution should not be awarded against his own estate, and for want thereof, against his body, for the sums aforesaid ; which our said court ordered accordingly. Now to the end, &c.

R. DANA.

Scire facias against bail.

Whereas A, of &c., by the consideration of our justices of our Court of C. P., holden at &c., on &c. within and for &c., recovered judgment against E, of &c., for the sum of \$— damages, and \$— costs of suit ; whereof the said E is convicted, as appears to us of record ; and judgment thereof was given ; and execution for the damages and costs aforesaid, in due form of law, was granted thereon, to the said A, bearing date the &c., directed to the sheriff of &c., and returnable into our Court of C. P., to be holden at &c., within &c., on &c., which said writ was thereafterwards committed to G, then and ever since a deputy-sheriff of &c., to be executed and returned according to law. And afterwards, viz. on &c., at &c., the said G made return of the same writ of execution into our said Court of C. P., holden at &c., on &c., with his indorsement thereon, in the words and figures following [*here insert the return,*] as by the writ of execution, now on file in the clerk's office of our said court, of record appears. And the said A avers that the said E hath avoided, and that the same judgment remains in full force, not satisfied, reversed, or annulled ; and whereas, heretofore, when the said E was taken by the original writ, on which said judgment was given, viz. on &c., at &c., S, of &c., by his bond to our sheriff of &c., under his hand and seal duly executed, then and there became, and was bail and surety for the said E, upon the said original writ, not only for the said E's appearance at the court to which the said writ was returnable, and answering to the said A, in his plea therein declared ; but also for the said E's abiding the final judgment thereon, and not avoiding ; as by the bail-bond, bearing date the &c., in court to be produced, appears : nevertheless, the said E did not appear at our said court, when and where the same original writ was returnable ; nor did he answer to the plea of the said A, therein declared against him ; nor has he any way abided or performed the judgment aforesaid of our said court thereon ; but hath avoided, and a return of *non est inventus* hath been duly made on the writ of execution issued against him on said judgment as aforesaid ; and the same remains wholly

unsatisfied, as we have heard from the suggestion of the said A ; and he hath supplicated us to provide remedy for him in this behalf ; and we, willing that justice be done in the premises, command you that you make known to the said S, that he be before our justices of our Court of C. P. to be holden at &c., within &c., on &c., then and there to show cause (if any he have) why the said A should not have his execution against said S, for his damages and costs aforesaid, and further to do and receive what our said court shall then and there consider concerning him, in this behalf ; and then and there have you this writ, &c. Witness, &c.

The same, in a shorter form.

Whereas R, of &c., before our justices of our Inferior Court of C. P., holden at &c., on &c., by the consideration of our said justices, recovered against I, of &c., the sum of \$—, and also \$— for costs and charges, by him about his suit in that behalf expended ; whereof the said I is convict as to us appears of record ; and although judgment be thereof rendered, and our writ of execution thereupon issued, on &c., directed to the sheriff of &c., which was afterwards duly delivered to H, then and ever since a deputy-sheriff of the same county, to be executed according to law ; yet the said I hath not abode the judgment aforesaid, but ever since the giving of the same, hath avoided, so that he could not be found ; and the aforesaid deputy-sheriff hath returned upon the said writ, into our said court, held at &c. on &c., when and where the same writ was returnable, that [*here insert the return ;*] and so returned it in no part satisfied ; and the said R saith, that the judgment aforesaid is still altogether unsatisfied, and remains in full force ; whereof the said R hath supplicated us to provide remedy for him in this behalf. Now, to the end that justice be done, we command you to make known unto L, of &c., who was bail and surety for the said I upon the original process, whereupon the judgment aforesaid was given, not only for his appearance to answer the plaintiff upon the process aforesaid, but also for his abiding the judgment of said court, that should be given thereon, that he be before our justices &c., to show cause, if any he have, wherefore the said R should not have judgment and execution, &c. [*as before.*]

R. DANA.

PETITIONS FOR SALE.

Petition by feme covert for license to sell real estate, her husband having deserted her.

To the Hon. &c. H T, wife of B T, late of &c., mariner, respectfully represents, that the said B T hath absented himself from this commonwealth, and hath deserted his said wife, and hath not made any provision for the support and maintenance of herself or of her child which she has had by the said B T; that the said B T and the said H T are seized in fee, in her right, of the real estate following, viz. &c.; wherefore the said H T prays this honorable court to empower and enable her, during the absence of her said husband from this commonwealth, in her own name, to make and execute any contract, either under seal or otherwise, and by deed to sell and convey all her interest in said real estate, and to commence, prosecute, and defend any suit in law or equity to final judgment in the same manner, as fully and to all intents and purposes, as if she was sole and unmarried, according to the statute in such case made and provided, &c.

NOTE. The above petition is drawn under Mass. Stat. of 1787, ch. 32, sec. 1. Under Rev. Stat. ch. 77, sec. 1, "when any married man shall absent himself from the state, abandoning his wife and not making sufficient provision for her maintenance, *if the wife is at the age of twenty-one years*, the Supreme Judicial Court may, on her petition, authorize her to sell and convey her real estate, or any part thereof, and also any personal estate, which shall at any time have come to the husband, by reason of the marriage, and which may remain within the state undisposed of by him."

In addition to the allegations contained in the above petition, a petition under this clause in the Rev. Stat. should allege the wife to be of the age of twenty-one years.

If the application is for the sale of personal estate, the personal estate should be described particularly, and it should appear that it came to the husband by reason of the marriage, and that it remains within the commonwealth undisposed of by him.

By administrator.

To the Hon. the Justices &c. H P of &c., gentleman, administrator of the goods and estate, which were of E D, late of &c., Esq., deceased, intestate, respectfully represents, that the debts due from the estate of the said intestate, amount to \$— more than all his personal estate; that the said intestate died seized of the real estate herein-

after described, *viz.* &c. ; he therefore prays that he may be licensed and authorized to sell and convey so much of the real estate of the said deceased, as will raise the said sum of \$—, with incidental charges, under such regulations as are provided by law, &c.

By guardian of a person non compos mentis.

To the Hon. &c. H P, of &c., gentleman, guardian of E D, of &c., a person *non compos mentis*, respectfully represents, that the said E D is seized of real estate in M aforesaid, of the value of \$—, and personal estate of the value of \$—; that the said E D is living at a great expense; and has already incurred debts to the amount of \$—; and that the income of the said estate is not sufficient to support the said E D. The said petitioner therefore prays, that he may be licensed and empowered to sell and convey all the real estate of the said E D, upon giving bonds according to law, &c.

By guardian of minors.

To the Hon. &c. A B, of &c., gentleman, guardian of W X and Y Z, minors, and children of M N, late of &c. Esq., deceased, respectfully represents, that the said minors are seized in fee simple, each of one undivided third part of a certain lot of land, situate &c., bounded and described as follows, *viz.* &c.; that it would be for the benefit of the minors, that all their interest in said estate should be disposed of, and the proceeds be put out and secured to them on interest; he therefore prays this honorable court to authorize some suitable person or persons to sell, and by good and sufficient deeds to convey all the estate of the said minors, *such person or persons giving bonds, and observing the rules and directions of law in such cases made and provided, &c.*

COMPLAINTS.

For affirmation of judgment, because appellee (original defendant) hath not prosecuted his appeal from a judgment of Justice of the Peace.

COMPLAINT. Essex ss. To the Honorable the Court of &c. complains, R R, of &c., against D D, of &c., for that he, the said R R, before T H, Esq., one of the justices &c.,

on &c., recovered judgment against the said D D for the sum of \$— damages and costs of suit, from which judgment the said D D appealed to this court, and recognized to prosecute such appeal, but has failed so to do; wherefore the said R R prays affirmation of said judgment, with additional damages and costs.

S. SEWALL.

For affirmation of judgment, because appellee (original plaintiff,) hath not prosecuted his appeal from the judgment of Common Pleas.

COMPLAINT. Suffolk ss. To the Honorable the Court of &c. R R, of &c., complains that at a court of &c., held at &c., on &c. last, within and for the said county of &c., he recovered judgment against D D, of &c., for the sum of \$— and costs of suit, from which judgment the said D D appealed to this honorable court and recognized to prosecute the same, but failed so to do; wherefore the complainant prays affirmation of said judgment, with additional costs.

B. HITCHBORNE.

For costs, because plaintiff hath not entered his action at Court of Common Pleas, where the defendant was served with a summons.

COMPLAINT. Essex ss. To the Honorable the justices of the Court of &c., complains, R R v. D D, for that he, the said R R, was summoned at the suit of the said D D to appear in this court at the term aforesaid, but the said D D has failed to enter his said action, and has discontinued the same; wherefore the said R R prays judgment for his costs in this behalf sustained.

S. SEWALL.

For costs, because plaintiff hath not entered his action, where the defendant was arrested.

COMPLAINT. Suffolk ss. To the Honorable the Court of &c. R R, of &c., complains, that on &c. your complainant, being then resident at said &c., was arrested by virtue of a writ issuing from, duly returned to, and on the files of said court, and your complainant was thereby obliged to give bail for his appearance to answer to D D, of &c., in a plea of the case, as appears by the files of this court; at which time the said D D neglected to enter his said action; wherefore your complainant prays judgment against the said D D, for his costs, by reason of the non-entry of the said D D of his writ aforesaid.

B. HITCHBORNE.

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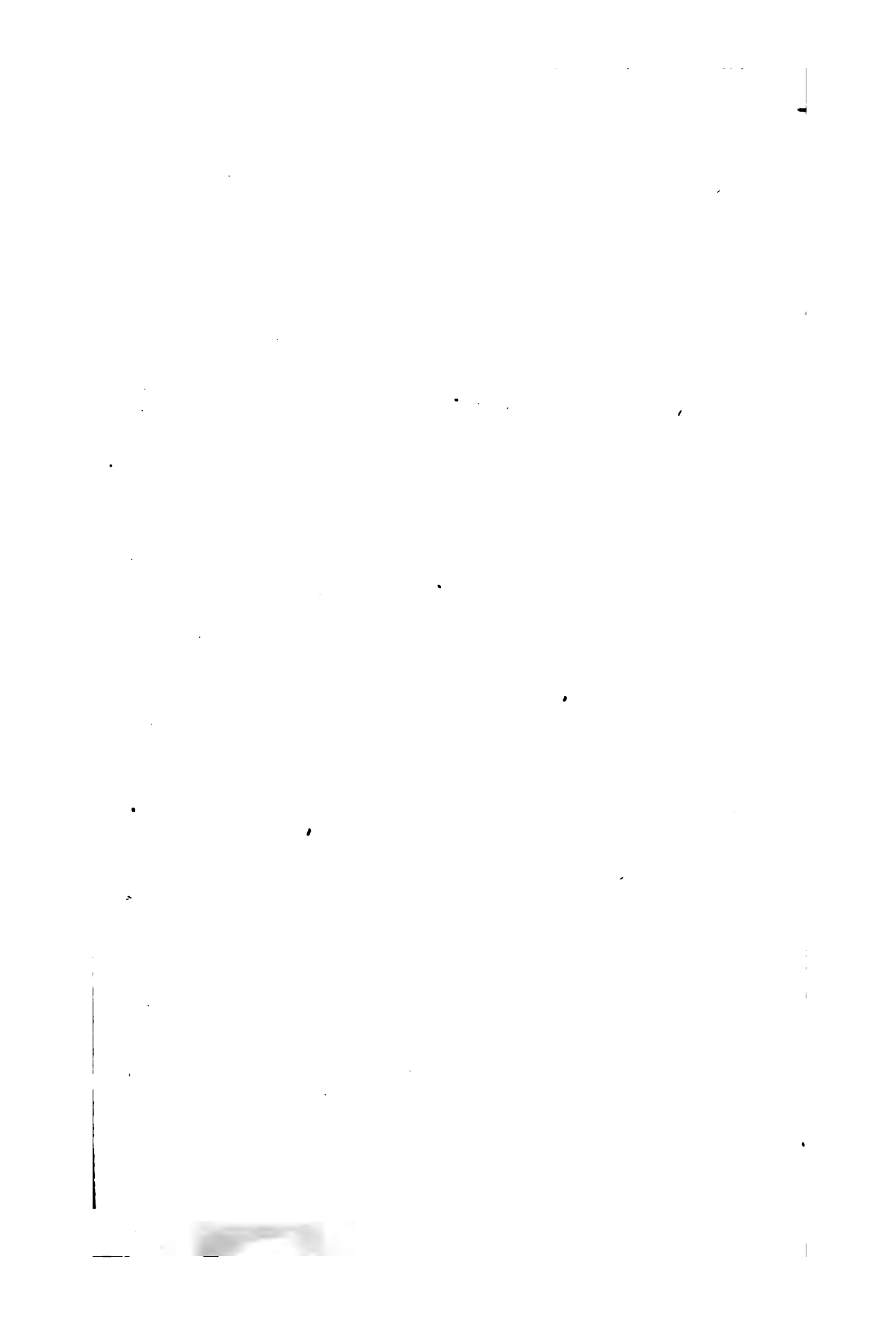
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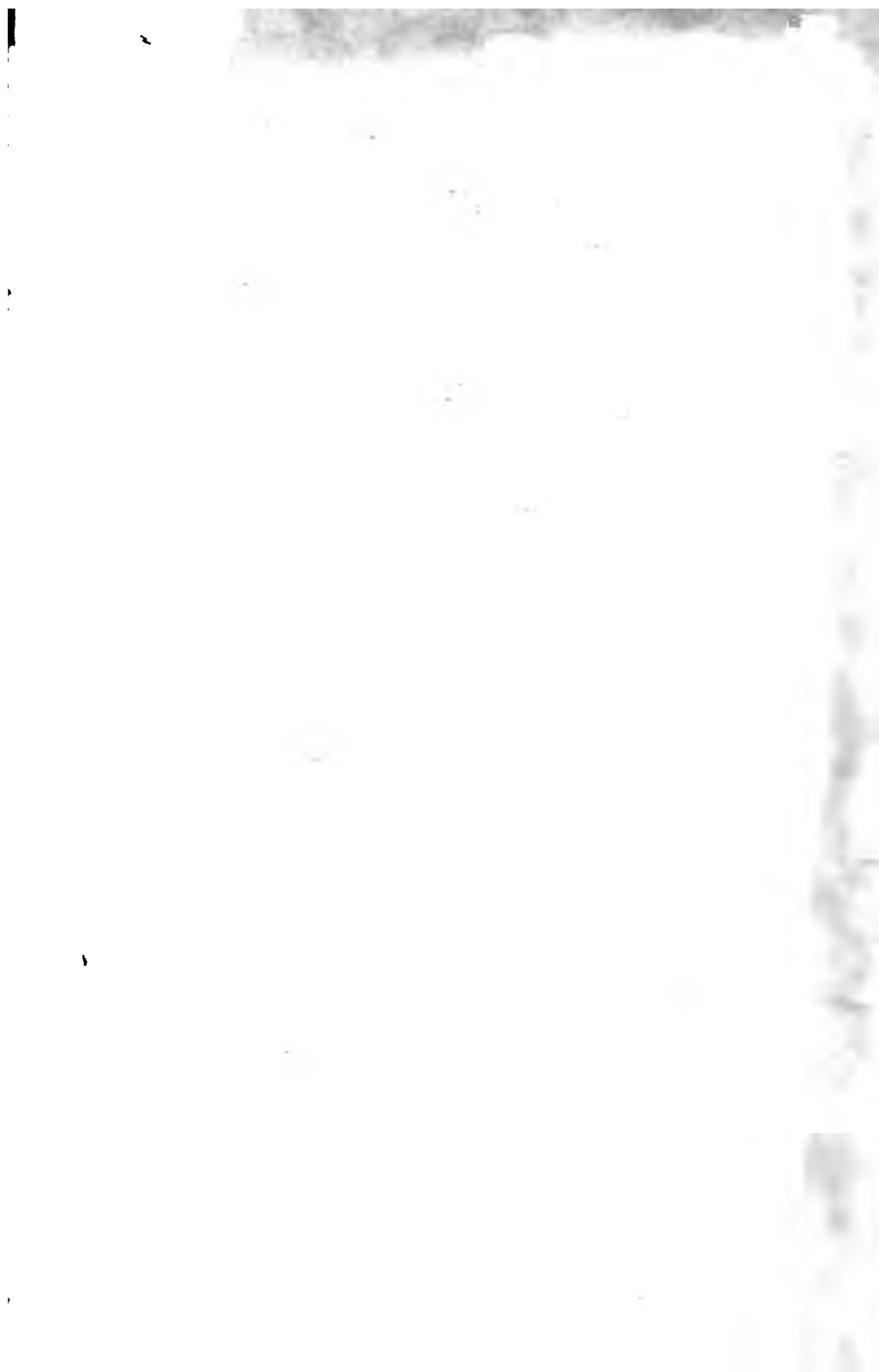
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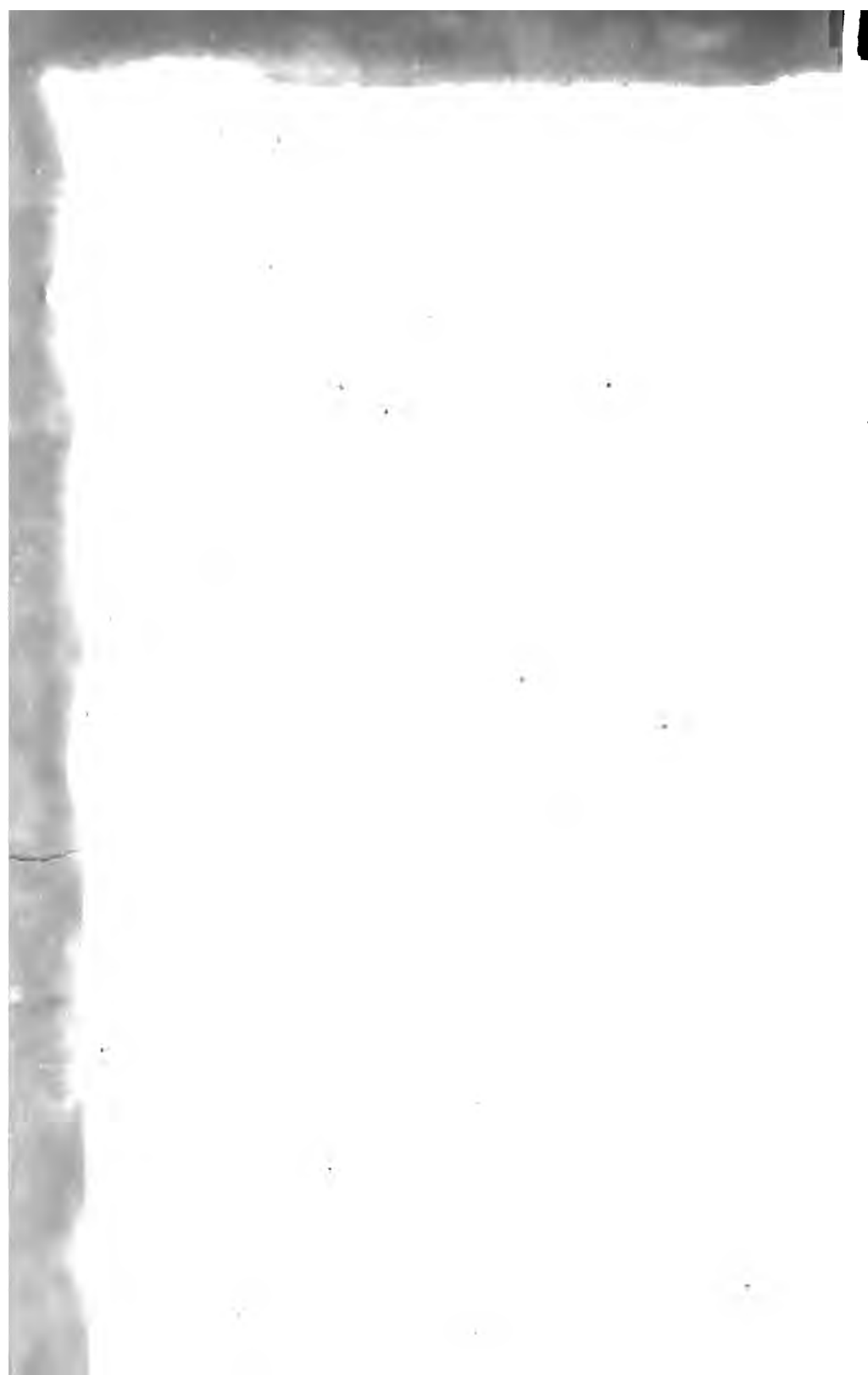
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Mem. — There are other annotations annexed to particular forms, but it was considered unnecessary to notice them particularly, being numerous and usually very short and concise.









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